THE ORIGINS OF THE INDEPENDENT JUDICIARY TRAVELING SEMINAR

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GENERAL OVERVIEW

Stages of Judicial Development in 17th and 18th century England and America:

1. Monarch or Governor controls judiciary through appointment and salaries
2. Evolutionary movement toward greater independence of both juries and courts
3. Legislative control over judiciary (Parliament and state assemblies)
4. Independence as a separate branch of government

• **Courts in England** under control of the monarch. Judges controlled by the monarch and his ministers; juries controlled by judges. **Dr. Bonham's Case** (1610) and **Bushell's Case** (1670) moderated this control. **Act of Settlement** (1701) gives judges appointment for good behavior but they could be removed by address of a majority of both houses of Parliament. Gradually after the Glorious Revolution of 1688–89, Parliament's authority grows to the point by the mid-18th century it declares its own supremacy. By an act of Parliament in 1760, the commissions of judges ceased to terminate with the death of the monarch. Acts passed by Parliament are now to be ipso facto constitutional. The courts have no legal authority to strike down any law enacted by Parliament.

• **Colonial American courts** (largely through the control of colonial assemblies over judges' salaries and the independent action of juries) become more democratic and juries judge both the facts and the law of the case. Partially because of the lack of trained judges (and lawyers early in colonial America) and partially because juries just wanted to exert themselves to guarantee that justice (at least from the jury's perspective) was administered.

• **Revolutionary America:** Under the new state constitutions, judiciaries were placed under the control of state legislatures which were dominated by the lower houses of assembly. The assemblies had short terms, usually one year, and they appointed judges. Thus judges often have short terms or are amenable to assemblies for their salaries and are sometimes subject to some form of removal. Those states (New York and

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Massachusetts) where judges have longer terms, they are subject to impeachment or removal by address. Because of excesses of state legislatures in passing laws that violate the property or civil rights of some individuals (laws that benefit debtors at the expense of creditors, laws that disenfranchise certain portions of society, etc.), demands arose for state courts to assert their authority through judicial review and strike down "unconstitutional" laws.

- **Constitution of 1787** changes this by creating a separate judiciary protected with appointments for good behavior, removal by impeachment only (not by address), and the guarantee of no reduction in salaries during their terms.
- **Judicial Review:** No explicit provision in the Constitution for judicial review. James Madison opposed judicial review in the Constitutional Convention. He preferred a two-fold system whereby Congress would have the power to veto any act passed by a state legislature and a special federal council of revision composed of the President and some federal judges (modelled after New York's Council of Revision) would review every act passed by both houses of Congress. Significant benefits in this system. At one time this provision was in the draft constitution approved by the Constitutional Convention. It was eventually replaced by the Supremacy Clause and the understanding that the federal judiciary decides when (1) to implement the Supremacy Clause against a state and (2) to exercise judicial authority at the federal level in "all cases in law and equity, arising under the Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority."
- **Supremacy Clause:** "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

THE TRIAL OF JOHN PETER ZENGER, 1735

BACKGROUND

James Alexander (lawyer and party leader in New York) wrote to the Lords of Trade predicting that the old heated partisan disputes in New York were ended: "party differences seemed over and every thing seemed to promise an easier administration than any governor had ever met with in this place." Alexander's assessment was totally mistaken.

Governor William Cosby arrives in New York in August 1732 (dies 10 March 1736). He was quick-tempered, haughty, unlettered, jealous, greedy, and politically inept. He resurrected old party disputes, sold provincial offices, and presided over the economic decline of New York.

Dispute over Rip Van Dam's Salary — Van Dam, a New York City merchant, as senior member of the provincial council took over as acting governor on the death of Cosby's predecessor. On his arrival, Cosby demanded the traditional pay for an absentee governor — half of the acting governor's salary. Van Dam refused, saying that if Cosby was entitled to half of his salary, Van Dam was entitled to half of the perquisites Cosby had received as New York's governor while still in England. Van Dam's salary was less than £2,000 during that time, while Cosby's perquisites were estimated at about £6,400.

Cosby turned to the courts. Not the common law courts — the New York Supreme Court, where a jury would have ruled against him; not the Court of Chancery, since the governor was the chancellor; but the Supreme Court sitting as a court of exchequer—a court of equity. Some precedent for this, but this kind of court had not sat for many years, and when the Supreme Court did sit as a court of exchequer it did so with a legislative mandate. In this case, the Assembly opposed the convening of an exchequer court, knowing that the Supreme Court judges, appointed by the governor, would be sympathetic to Cosby's position. Americans generally opposed equity courts that addressed cases that were abstract and relied upon the decisions of judges without juries. They preferred cases in common law and legislation that sat with juries. Cosby ordered

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Attorney General Richard Bradley to issue an "information" against Van Dam, which came before the three-judge Supreme Court on 9 April 1733. Van Dam's lawyers argued against using the equity jurisdiction and Chief Justice Lewis Morris agreed. His two associate justices James DeLancey and Frederick Philipse disagreed. Morris rebuked his young colleagues and published his long discourse. Two weeks after the trial an outraged Cosby dismissed Morris and raised DeLancey to Chief Justice, thus precipitating a four-year long partisan battle. Morris was not only one of the wealthiest inhabitants but the leader of the powerful land-based political faction. Soon Van Dam's case faded (the governor chose not to pursue it) as Morris led a campaign to oust Cosby.

Lewis Morris to the Lords of Trade, 27 August 1733

"The reasons for displacing a Judge should . . . be not only in themselves very good, but very evident; nothing being more distastfull than the arbitrary removal of Judges, because every man that has anything he calls his own must naturally think the enjoyment of it very precarious under such an administration, and our Governour's conduct has been such as fully to perswade those under his Govern[men]t that he thinks himself above the restraint of any Rules but those of his own will."

"If judges are to be intimidated so as not to dare to give any opinion but what is pleasing to a *governor* . . . the people of this province" might well feel concern about the independence of their courts.

Morrisites temporarily win control of colonial assembly and the common council of New York City. Morris sent to London to try to get Cosby recalled and the Morrisites launch a newspaper — *The New York Weekly Journal* in opposition to the only other newspaper — William Bradford's *New York Gazette*. Bradford, as the official government printer earning £50 annually, did not print anything opposed to the government.

What was the status of Freedom of the Press in England and its American colonies?

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When the printing press was introduced in England at the end of the 15th century, they were quickly brought under strict control. Through a serries of royal proclamations, Parliamentary acts, and Star Chamber decrees a rigid system of censorship was instituted. Nothing could be printed unless it was first approved by a state or ecclesiastical official. No book could be imported or sold without a license. All printing presses were required to be registered and the number of master printers was restricted. Authorities were given sweeping powers to search for contraband printed matter. In 1637 the Star Chamber codified the regulation and licensing of the press. The Star Chamber was abolished in 1641 but the Long Parliament reenacted the licensing requirement in 1643, 1647, 1649, and 1652. The Restoration Parliament renewed the enactment in 1662 and regularly thereafter until, in 1695 the last of a series of licensing laws was allowed to lapse, thus abandoning the system of advanced censorship — prior restraint. But the laws of seditious libel remained unchanged. Any criticism of the government or its officials, whether true or false, was severely punished. Sir William Blackstone summarized the English law as it existed in 1769: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon public actions, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

By the 18th century the common law courts of the King's Bench had assumed jurisdiction in libel cases. These courts had juries, but juries in cases of libel were limited to the determination of the fact of publication and innuendo — were the statements aimed at the government or public officials. The juries would thus come in with a "special verdict" of guilty or not guilty. Then, the judges determined whether the accused was guilty of libel, which was almost always found to be the case. Although no libel laws were enacted in colonial America, English practice carried over to the New World.

The New York Weekly Journal was published by John Peter Zenger, but really guided by James Alexander, who wrote most of the "invective and satire against the

Governor." Articles included abstract discussions of government policy and administration and vicious personal attacks against the governor and his cronies. Even the advertisements included sham pieces attacking the governor — modern equivalents of political cartoons. Although the Governor refused to get involved in a newspaper war of words with Morris, Van Dam and Alexander, he soon realized that the *Journal*'s influence was increasing and it was becoming a threat to public order and his administration. The *Journal* clutched the mantle of freedom of the press.

New York Weekly Journal, 12 November 1733

"For if such an overgrown criminal, or an impudent monster in iniquity, cannot immediately be come at by ordinary justice, let him yet receive the lash of satire, let the glaring truths of his ill administration, if possible, awaken his conscience, and if he has no conscience, rouse his fear, by showing him his deserts, sting him with shame, and render his actions odious to all honest minds."

Liberty, according to the Journal, depended upon a free press.

"The loss of liberty in general would soon follow the suppression of the liberty of the press; for it is an essential branch of liberty, so perhaps it is the best preservative of the whole. Even a restraint of the press would have a fatal influence. No nation ancient or modern ever lost the liberty of freely speaking, writing or publishing their sentiments, but forthwith lost their liberty in general and became slaves." (19 November 1733)

New York Gazette, 28 January–4 February 1734 (Government newspaper)
"'Tis the abuse not the use of the press that is criminal and ought to be punished."

New York Weekly Journal, 18 February 1734 responded:

"I agree with the Author that it is the abuse, and not the use of the press, is blameable. But the difficulty lies who shall be the judges of this abuse. . . . Make our adversaries the judges; I don't well know what will not be a libel; and perhaps, if we be

the judges it will be as difficult to tell what will. I would have the readers judges: but they can't judge if nothing is wrote."

Thus the Morrisites wanted the law of seditious libel continued. They wanted no prior restraint on the press, which would be subject to subsequent prosecution and punishment, as judged by a local jury, which would find truth as a defense.

On two occasions (January and October 1734) Chief Justice DeLancey charged the grand jury with bringing in an indictment against Zenger for his libelous publications. The grand jury refused. The governor and council ordered copies of the *Journal* to be publicly burned, but the assembly and the New York City common council refused to cooperate. The Council ordered the arrest of Zenger and any others responsible for the libelous pieces. On 17 November 1734 Zenger was arrested and imprisoned. The next day James Alexander and William Smith formally engaged as Zenger's attorneys and

Lewis Morris goes to London with instructions to seek the recall of Cosby.

1. Assembly elections should be annual or at least triennial
2. Council should sit separately from governor
3. Courts should be established by law
4. Judges should sit during good behavior
5. New method of appointing councillors and sheriffs
6. Land grants should be made without exorbitant fees to governor
7. Assembly should regularly be reapportioned based on population
8. New charters for New York City and Albany
9. Encouragement of manufactures
10. Restoration of Morris as chief justice
11. Removal of Cosby as governor

Chief Justice James DeLancey: Charge to the Grand Jury, October 1734

"Libels . . . are arrived to that height that they call loudly for your animadversion;

it is high time to put a stop to them; for at the rate things are now carried on, when all order and government is endeavored to be trampled on; reflections are cast upon persons of all degrees, must not these things end in sedition, if not timely prevented? Lenity, you have seen will not avail. . . . If you, Gentlemen, do not interpose, consider whether the ill consequences that may arise from any disturbances of the public peace may not in part lie at your door?"

Alexander and Smith immediately sought a writ of habeas corpus to obtain Zenger's release. According to his attorneys, Zenger was only charged with a misdemeanor and was personally worth only about £40. DeLancey, who had signed the arrest warrant, announced that if the jury found Zenger not guilty, "they would be perjured." DeLancey set bail at £400. He remained in jail for eight months until the end of his trial.

A new sheriff impanelled a new grand jury which again refused to indict Zenger. Therefore on January 28, 1735, Attorney General Richard Bradley filed an information charging Zenger with seditious libel. "Information" was a method by which the government could initiate prosecution independent of an indictment by a grand jury. It was viewed as an arbitrary procedure that undercut the protections afforded by the jury system.

Andrew Hamilton: Give me leave to say as great men as any in Britain have boldly asserted that the mode of prosecuting by *information* (when a Grand Jury will not find *billa vera* [a true bill]) is a national grievance, and greatly inconsistent with that freedom which the subjects of England enjoy in most other cases.

New York Attorney General Richard Bradley: Information against John Peter Zenger, January 1735

"John Peter Zenger . . . printer (being a seditious person and a frequent printer and publisher of false news and seditious libels, and wickedly and maliciously devising

the government of . . . New York . . . did falsely, seditiously and scandalously print and publish, and cause to be printed and published, a certain false, malicious, seditious scandalous libel, entitled *The New York Weekly Journal . . .*"

THE TRIAL OF JOHN PETER ZENGER

At the beginning of the trial, contrary to a warning from Chief Justice DeLancey, Alexander and Smith questioned the validity of the two presiding judges, by presenting "exceptions" to their commissions. DeLancey and Philipse were to serve at the pleasure of the governor rather than during good behavior as stipulated for comparable judges in England under the Act of Settlement of 1701. Furthermore, the commissions were granted without the "advice and consent" of the Council. In essence, the lawyers accused Cosby of appointing henchmen, who contrary to English and New York tradition, were guaranteed to come in with a verdict of guilty. The judges refused to hear the exceptions and for their contempt, DeLancey dismissed them from the case and disbarred them from practicing. The court appointed a new lawyer to defend Zenger. James Alexander, however, convinced Philadelphian Andrew Hamilton, reputedly the best lawyer in America, to represent Zenger.

The ISSUES:

(1) Truth was a defense against an accusation of libel. Chief Justice DeLancey did not want to allow Hamilton to pursue an investigation into the truth of the alleged libelous statements.

Andrew Hamilton: "I cannot think it proper for me (without doing violence to my own principles) to deny the publication of a complaint which I think is the right of every free-born subject to make when the matters so published can be supported with truth; and therefore I'll save Mr. Attorney the trouble of examining his witnesses to that point; and I do (for my client) confess that he both printed and published the two newspapers set forth in the information, and I hope in so doing he has committed no crime. . . . I hope it is not our bare printing and publishing a paper that will make it a libel: You will have something more to do before you make my client a libeler; for the words themselves must

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be libelous, that is, *false, scandalous, and seditious* or else we are not guilty."

Chief Justice DeLancey: You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified; for it is nevertheless a libel that it is *true*.

Andrew Hamilton: I am sorry the Court has so soon resolved upon that piece of law. . . . I know it is said *that truth makes a libel the more provoking, and therefore the offense is the greater, and consequently the judgment should be the heavier*. Well, suppose it were so, and let us agree for once *that the truth is a greater sin than falsehood:* Yet as the offenses are not equal, and as the punishment is arbitrary, *that is*, according as the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the libel is *true* or *false*, that they may by that means be able to proportion the punishment? For would it not be a sad case if the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie as for writing or publishing a truth? And yet this (with submission), as monstrous and ridiculous as it may seem to be, is the natural consequence of Mr. Attorney's doctrine *that truth makes a worse libel than falsehood*. . . .

Chief Justice DeLancey: [Still maintains that truth is no justification against libel.] Mr. Hamilton, the Court have delivered their opinion, and we expect you will use us with good manners; you are not to be permitted to argue against the opinion of the Court.

Andrew Hamilton: Then, gentlemen of the jury, it is to you we must now appeal for witnesses to the truth of the facts we have offered and are denied the liberty to prove; and let it not seem strange that I apply myself to you in this manner. . . . You are really what the law supposes you to be, *honest and lawful men;* and according to my brief, the facts which we offer to prove were not committed in a corner; they are notoriously known to be true and therefore in your justice lies our safety. And as we are denied the liberty of giving evidence to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, *that the suppressing of evidence ought always to be taken for the strongest evidence;* and I hope it will have that weight with you.

(2) That precedents taken from the Star Chamber were invalid — they died with the death of that court in 1641. Especially the 1606 ruling in *de Libellis Famosis* that true statements could be libelous. The Star Chamber originated in a 1487 law during the reign of King Henry VII. It consisted of the entire privy council (or a committee of the council), the chancellor, the treasurer, the keeper of the seal, two judges, one temporal lord and one bishop. Usually led by the chancellor, who was almost always a cleric, it was in essence a politicians' court where policy was enforced; not a court of judges to administer the law — it was a forum in which the privy council, after issuing ordinances and executing the law, could act as a court to try the cases and administer penalties. With virtually unlimited jurisdiction — both criminal and civil — it often handled political cases involving sedition, libel, riots, etc. Its procedures were extremely informal and its sessions were often open to the public. There was no trial by jury, no bail, and no protection from self incrimination. Although it could not inflict the death penalty, it used torture and forced confessions to render swift and summary judgment. It regularly punished jurors from the common-law courts who rendered perverse verdicts or refused to follow the instructions of judges. Penalties, assigned by discretion of the court instead of by law, ranged from excessive fines and imprisonment to whipping, corporal punishment, branding, cutting of ears, slitting noses the pillory, and other forms of public humiliation. It was abolished by the Long Parliament on 5 July 1641 on the grounds that it had far exceeded its original legal mandate.

Andrew Hamilton: I was in hopes, as that terrible Court, where those dreadful judgments were given and the law established which Mr. Attorney has produced for authorities to support this cause, was long ago laid aside as the most dangerous court to the liberties of the people of England that ever was known in that kingdom; that Mr. Attorney knowing this would not have attempted to set up a Star Chamber here, nor to make their judgments a precedent to us: For it is well known that what would have been judged treason in those days for a man to speak, I think, has since not only been practiced as lawful, but the contrary doctrine has been held to be law.

Andrew Hamilton: It is true in times past it was a crime to speak truth, and in

that terrible Court of Star Chamber, many worthy and brave men suffered for so doing: and yet even in that Court and in those bad times, a great and good man durst say, what I hope will not be taken amiss of me to say in this place, *to wit, The practice of informations for libels is a sword in the hands of a wicked king and an arrant coward to cut down and destroy the innocent; the one cannot because of his high station, and the other dares not because of his want of courage, revenge himself in another manner.*

Mr. Attorney General Bradley: Pray, Mr. Hamilton, have a care what you say, don't go too far neither, I don't like those liberties.

Andrew Hamilton: . . . the great diversity of opinions among judges about what words were or were not scandalous or libelous. I believe it will be granted that there is not greater uncertainty in any part of the law than about words of scandal; it would be misspending of the Court's time to mention the cases; they may be said to be numberless; and therefore the utmost care ought to be taken in following precedents; and the times when the judgments were given which are quoted for authorities in the case of libels are much to be regarded. I think it will be agreed that ever since the time of the Star Chamber, where the most arbitrary and destructive judgments and opinions were given that ever an Englishman heard of, at least in his own country: I say prosecutions for libels since the time of that arbitrary Court, and until the Glorious Revolution, have generally been set on foot at the instance of the Crown or its ministers; and it is no small reproach to the law that these prosecutions were too often and too much countenanced by the judges, who held their places at pleasure (a disagreeable tenure to any officer, but a dangerous one in the case of a judge). To say more to this point may not be proper. And yet I cannot think it unwarrantable to show the unhappy influence that a sovereign has sometimes had, not only upon judges but even upon Parliaments themselves.

Andrew Hamilton: There is heresy in law as well as in religion, and both have changed very much.

(3) The law of seditious libel was intended to protect the King and his ministers — not colonial governors. What is good law in England is not

necessarily good law in America. Early sense of American uniqueness.

Andrew Hamilton: As times have made very great changes in the laws of England, so in my opinion there is good reason that places should do so too. . . . Is it so hard a matter to distinguish between the majesty of our Sovereign and the power of a governor of the plantations? Is not this making very free with our Prince, to apply that regard, obedience and allegiance to a subject which is due only to our Sovereign? . . . Let us not (while we are pretending to pay a great regard to our Prince and his peace) make bold to transfer that allegiance to a subject which we owe to our King only. What strange doctrine is it to press everything for law here which is so in England? . . . What is good law at one time and in one place is not so at another time and in another place.

(4) The people had a right to criticize their rulers. This right rested on the assumption that the state exists to protect each person's liberty and property. Rulers were merely guardians of the public good. The New York establishment (Cosby, Bradley, and DeLancey) argued that the law was based upon the premise that the state, in the form of the Crown and its servants, was sovereign and immune from criticism. The Morrisites argued that government was the servant of the people and that open criticism was one of the important ways in which magistrates could be held responsible for their actions.

Attorney General Bradley observed upon the excellency as well as the use of government, and the great regard and reverence which had been constantly paid to it, both under the law and the gospel. That by government we were protected in our lives, religion and properties; and that for these reasons great care had always been taken to prevent everything that might tend to scandalize magistrates and others concerned in the administration of the government, especially the supreme magistrate. And that there were many instances of very severe judgments, and of punishments inflicted upon such, as had attempted to bring the government into contempt; by publishing false and scurrilous libels against it, or by speaking evil and scandalous words of men in authority; to the great disturbance of the public peace. [Gives citations.] From these books he

insisted that a libel was a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive or the memory of one that is dead; if he is a private man, the libeler deserves a severe punishment, but if it is against a magistrate or other public person, it is a greater offense; for this concerns not only the breach of the peace, but the scandal of the government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed by the King to govern his subjects under him? And a greater imputation to the state cannot be than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice. . . . the government had been much traduced and exposed by Mr. Zenger before he was taken notice of; that at last it was the opinion of the Governor and Council that he ought not to be suffered to go on to disturb the peace of the government by publishing such libels against the Governor and the chief persons in the government; and therefore they had directed this prosecution to put a stop to this scandalous and wicked practice of libeling and defaming His Majesty's government and disturbing His Majesty's peace.

Andrew Hamilton: I agree with Mr. Attorney, that government is a sacred thing, but I differ very widely from him when he would insinuate that the just complaints of a number of men who suffer under a bad administration is libeling that administration. . . . But from what Mr. Attorney has just now said, to wit, that this prosecution was directed by the Governor and Council, and from the extraordinary appearance of people of all conditions which I observe in Court upon this occasion, I have reason to think that those in the administration have by this prosecution something more in view, and that the people believe they have a good deal more at stake, than I apprehend.

Andrew Hamilton: I will go so far into Mr. Attorney's doctrine as to agree that if the faults, mistakes, nay even the vices of such a person be private and personal, and don't affect the peace of the public, or the liberty or property of our neighbor, it is unmanly and unmannerly to expose them either by word or writing. But when a ruler of a people brings his personal failings, but much more his vices, into his administration, and the people find themselves affected by them, either in their liberties or properties, that

will alter the case mightily.

Andrew Hamilton: for such is the sense that men in general (I mean freemen) have of common justice, that when they come to know that a chief magistrate abuses the power with which he is trusted for the good of the people, and is attempting to turn that very power against the innocent, whether of high or low degree, I say mankind in general seldom fail to interpose, and as far as they can, prevent the destruction of their fellow subjects. And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are by just representations or remonstrances made sensible of the sufferings of their fellow subjects by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by His Majesty he was appointed, and by the law he is bound to protect and encourage. But I pray it may be considered of what use is this mighty privilege if every man that suffers must be silent? . . . It is natural, it is a privilege, I will go farther, it is a right which all freemen claim, and are entitled to complain when they are hurt; they have a right publicly to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.

Andrew Hamilton: but when a governor departs from the duty enjoined him by his Sovereign, and acts as if he was less accountable than the Royal Hand that gave him all that power and honor which he is possessed of; this sets people upon examining and enquiring into the power, authority and duty of such a magistrate, and to compare those with his conduct, and just as far as they find he exceeds the bounds of his authority, or falls short in doing impartial justice to the people under his administration, so far they very often, in return, come short in their duty to such a governor. For power alone will not make a man beloved, and I have heard it observed that the man who was neither good nor wise before his being made a governor, never mended upon his preferment, but has been

generally observed to be worse: For men who are not endued with wisdom and virtue can only be kept in bounds by the law; and by how much the further they think themselves out of the reach of the law, by so much the more wicked and cruel men are.

Andrew Hamilton: that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and those restraints can only extend to what is *false.*

Andrew Hamilton: . . . it is pretty clear that in New York a man may make very free with his God, but he must take special care what he says of his governor. It is agreed upon by all men that this is a reign of liberty, and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power. I mean of that part of their conduct only which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves.

(5) Restricting juries to special verdicts would render juries "useless." and Juries had the right to return a general verdict where law and fact were intertwined.

Andrew Hamilton: I must insist that where matter of law is complicated with matter of fact, the jury have a right to determine both. . . . The right of the jury to find such a verdict as they in their conscience do think is agreeable to their evidence is supported by the authority of Bushel's case [1670]. . . . Mr. Bushel, who valued the right of a juryman and the liberty of his country more than his own, refused to pay the fine, and was resolved (though at a great expense and trouble too) to bring, and did bring, his *habeas corpus* to be relieved from his fine and imprisonment, and he was released accordingly; and this being the judgment in his case, it is established for law *that the judges, how great soever they be, have no right to fine imprison or punish a jury for not finding a verdict according to the direction of the Court.* And this I hope is sufficient to prove that jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or

estates of their fellow subjects.

Andrew Hamilton: A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons.

Andrew Hamilton: the question before the Court and you gentlemen of the jury is not of small nor private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may in its consequence affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempts of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right — the liberty — both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.

Chief Justice DeLancey: I shall therefore only observe to you that as the facts or words in the information are confessed: The only thing that can come in question before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt, and which you may leave to the Court.

THE VERDICT IN THE JOHN PETER ZENGER CASE

"The jury withdrew and in a small time returned and being asked by the Clerk whether they were agreed of their verdict, and whether John Peter Zenger was guilty of printing and publishing the libels in the information mentioned? They answered . . . *Not Guilty*, upon which there were three huzzas in the hall which was crowded with people and the next day I was discharged from my imprisonment."

Andrew Hamilton, in essence, appealed to the jury and their personal experience and not to the letter of the law. The law was against Zenger, but the law was out of step with public opinion in America. Hamilton used the public's opinion rather than the law to

obtain a verdict of not guilty.

THE LEGACY OF THE JOHN PETER ZENGER CASE

It underlined the power — though not the right — of juries to give general verdicts acquitting men who would otherwise be ruled guilty by a judge. By the time the controversy ended, the Morrisites had founded an opposition newspaper, launched a colony-wide petition campaign, and had fashioned the beginnings of a party system.

English tradition: It continued the trend begun in 1721 with the writings of Trenchard and Gordon as Cato. In 1792 Fox's Libel Act granted the jury the right to render a general verdict. Not till 1843 with Lord Campbell's Act was truth made a defense in libel cases.

American tradition: Zenger had a chilling effect on colonial governors pursuing judicial prosecutions for seditious libel in America. It became much more common for legislative assemblies to call authors and printers before their own bar for breaches of the assembly's privileges and dignity. After 1735, the real threat of prosecution for seditious libel ceased to be from the executive through the courts. From 1747 to 1770 legislative assemblies actually tried more cases before their own bars. Thus the Zenger decision, while de facto reducing the prerogative of the governors, increased the prerogative of the assemblies.

Officially, however, the common law interpretation of freedom of the press remained. People disagreed over the interpretation. The Zenger case provided libertarians with ammunition for their interpretation.

1791 Bill of Rights — First Amendment. Most agreed it merely meant no prior restraint on publishing. Some libertarians went further, arguing that the amendment made seditious libel against the government unconstitutional.

1798 Sedition Act made truth a defense, juries could give a general verdict, and the intent of the speaker was a criterion in determining libelousness. But the defendant might be forced to prove the truthfulness of the statement, rather than the prosecutor being forced to prove the falseness of the statement.

Jeffersonians use the law of libel harshly on the state level. After 1800 there was no federal libel law and in 1812 the U.S. Supreme Court ruled that there was no common law in the U.S., thus no one could be prosecuted in federal courts under the common law that applied to the Zenger case. In 1805 New York adopted the Zenger defense as law.

Direct Consequences of Zenger case:

- Board of Trade orders New York Council to sit without governor when sitting legislatively
- New York Supreme Court never sat again as a court of equity
- Septennial Act passed in 1738
- Governor George Clarke follows N.J. Governor Lewis Morris in accepting one-year revenue from assembly
- Precedent of popular opposition to arbitrary rule

Zenger case was a symbol of the importance of

- an independent judiciary
- the natural right to publicly criticize government and to petition grievances
- freedom of the press and freedom of speech
- independent jury

At various times that symbol has been referenced — during the Revolutionary struggle, during the Federalist ascendancy with the Alien and Sedition Laws, during the Red Scare after World War I, and during the McCarthy era.

In speaking of the Zenger decision:

"Z," *Pennsylvania Gazette*, no. 492. (1738)

"If it is not law it is better than law, it ought to be law, and will always be law wherever justice prevails."

THE CASE OF EBENEZER RICHARDSON, 22 FEBRUARY 1770, THE BOSTON MASSACRE, 5 MARCH 1770, AND THE IMPEACHMERNT OF CHIEF JUSTICE PETER OLIVER, 1773

Declaration of Independence: "The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World. . . . For quartering large Bodies of Armed Troops among us: For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States."

Benjamin Franklin: warned against sending troops to America.

1765: "They will not find a rebellion; they may indeed make one."

1769: "The sending soldiers to Boston always appeared to me a dangerous step; they could do no good, they might occasion mischief. When I consider the warm resentment of a people who think themselves injured and oppressed, and the common insolence of the soldiery, who are taught to consider that people as in rebellion, I cannot but fear the consequences of bringing them together. It seems like setting up a smith's forge in a magazine of gunpowder."

EBENEZER RICHARDSON TRIAL

On 22 February 1770 a mob chased Ebenezer Richardson to his house and continued to taunt him. Richardson, about fifty years old was widely assumed to be be an informer for the British customs service. As his house was under seize he fired on the mob and accidentally shot a twelve-year old boy across the street. The mob almost lynched Richardson before he was taken into custody. The judges delayed Richardson's trial to calm down passions. But two weeks later a squad of Redcoats fired on a mob outside the Customs House, instanjtly killing three men, while two other men died shortly thereafter. Something had to be done to appease the people. Richardson was the scapegoat as his trial could no longer be delayed. The

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atmosphere in Boston was explosive as Richardson's trial commenced before the Massachusetts Supreme Court. The question to be decided was whether Richardson was guilty of murder or manslaughter, both capital offenses; or whether he had committed justifiable homicide. The trial demonstrated that the judiciary had totally lostg control.

Judge Peter Oliver: "It very unluckily happened, that about a Week after the forementioned killing, the Affair of the Soldiers firing upon the Inhabitants was acted. These two Circumstances brought on the final Close of Law & Justice. The Supreme Court met on the 2d. Tuesday of March. The Judges thought, that the present Rage of the People would preclude a fair Trial, either of the Custom House Officer or the Soldiers. They rather chose to postpone the Trials, untill there might be some Chance of Justice being uninterrupted; but it was not in their Choice; for the Madness of the People called aloud for Revenge; & had a Trial been refused, it was rather more than an equal Chance that the Prisoners would have been murdered by the Rabble; & the Judges have been exposed to Assassinations."

Judge Peter Oliver: "Authority of Courts of Law were now of little Force. Forms were maintained without much Power: & during this trial, whilst one of the Judges [Oliver himself] was delivering his Charge to the Jury, & declaring his Opinion, that the Case was *justifiable Homicide,* one of the Rabble broke out, 'Damn that Judge, if I was nigh him, I would give it to him;' but this was not a Time to attempt to preserve Decorum; Preservation of Life was as much as a Judge dared aim at."

Jury (none of whom were from Boston) began deliberations at 11:00 P.M. without food, drink or sleep, debated until 8 or 9:00 A.M. the next morning, finding Richardson guilty of murder. **Judge Peter Oliver** later said that "the Verdict was guilty of tenfold greater Criminality than the Prisoner."

Court receives and records the verdict, but adjourns until 29 May 1770. Due to illness, the court continued to 6 September, at which time it entertained a motion

for a new trial and it examined the jurors individually. (English law did not allow new trials in capital cases, and the Massachusetts Supreme Court was the highest court — so the verdict could not be appealed.)

The Richardson received reprieves before judgment pending a pardon from the Crown. Pardon issued on 12 February 1771; received in Boston early May 1771. Meanwhile Richardson remained in jail. On 10 March 1772, while Boston inhabitants met in town meeting, Richardson appeared in court where he was pardoned and released. He "fled with precipitation and crossed the ferry before the inhabitants were informed of it." He lived for a year in Stoneham and then received a customs appointment in Philadelphia.

BOSTON MASSACRE, 5 MARCH 1770

Captain Thomas Preston, eight soldiers, and four custom employees were indicted by the grand jury for murder in the death of five men in the mob on the evening of 5 March 1770.

Lt. Governor Thomas Hutchinson, *History of the Colony and Province of Massachusetts*: "The employing counsel who were warmly engaged in popular measures caused some of the evidence to be kept back which would otherwise have been produced for the prisoners. The counsel for the crown insisted upon producing evidence to prove the menaces of the soldiers preceding the action, and the counsel for the prisoners consented to it, provided they might have the like liberty with respect to the inhabitants. After the evidence had been given on the part of the crown, and divers witnesses had been examined to show the premeditated plan of the inhabitants to drive out the soldiers, one of the counsel, Mr. John Adams, for the prisoners then declined proceeding any further, and declared that he would leave the cause, if such witnesses must be produced as served only to set the town in a bad light. A stop therefore was put to any further examination of such witnesses, by

which means many facts were not brought to light which the friends to government thought would have been of service in the cause, though it must be presumed the counsel did not think them necessary, for it was allowed, that they acted with great fidelity to their clients, when it was evident, that a verdict in their favour, must be of general disservice to the popular cause, in which counsel had been, and afterwards continued to be, warmly engaged."

Trials

A couple Bostonians on Preston's jury; none on the soldiers' jury. Some radical leaders charged that the jury was packed. No transcript of Preston's trial; shorthand note-taker present at the soldiers' trial. The atmosphere in the courtroom was totally changed from Richardson's trial. "The Court was fill'd with Officers of the Army, Navy, and Customs, and Captain Preston appear'd perfectly unconcern'd as if conscious that the event would not prove prejudicial to him. . . . During the whole trial the greatest order and decorum was observed by the Spectators, and as soon as it was over they all departed very quietly." At the trial of the soldiers there was not an objection to a question or a motion to strike an answer.

Lt. Governor Hutchinson declared it a "fair trial."

Captain Thomas Preston reported to General Gage in New York: "I take the liberty of wishing you joy of the complete victory obtained over the knaves and foolish villains of Boston." The verdict was to the "entire satisfaction of every honest mind, and great mortification of every bloodthirsty and malicious Bostonian." (Preston gets a pension of £200 a year.)

SOLDIERS' TRIAL

Prosecution (Samuel Quincy): Needed to prove only that the defendants were present and that each had fired his weapon. Tried to show previous hostility of soldiers for the populace. Two weeks before the Massacre, Private Mathew Kilroy reportedly

said that he "would never miss an opportunity, when he had one, to fire on the inhabitants, and that he had wanted to have an opportunity ever since he landed." When told "he was a fool for talking so. He said he did not care."

On the morning of 6 March, several men saw Kilroy's bayonet with dried blood five to six inches from the point.

Summary statement: Should the jury conclude that the soldiers were unlawfully assembled, they must all be guilty, "for it has been abundantly proved to you by the numerous authorities produced by the counsel for the prisoners, that every individual of an unlawful assembly is answerable for the doings of the rest."

Defense (Josiah Quincy and John Adams): Dr. John Jeffries, a Boston physician who treated Patrick Carr's wounds (Carr, an immigrant from Ireland, died of his wounds), testified to what Carr had told him. "I asked him whether he thought the soldiers would fire. He told me he thought the soldiers would have fired long before. I asked him whether he thought the soldiers were abused a great deal, after they went down there. He said, he thought they were. I asked him whether he thought the soldiers would have been hurt, if they had not fired. He said he really thought they would, for he heard many voices cry out, kill them. I asked him then, meaning to close all, whether he thought they fired in self-defense, or on purpose to destroy the people. He said he really thought they did fire to defend themselves; that he did not blame the man whoever he was, that shot him." Carr also told him "that he had seen soldiers often fire on the people in Ireland, but had never seen them bear half so much before they fired in his life." The afternoon before he died, he talked with Jeffries. "He then particularly said he forgave the man whoever he was that shot him, he was satisfied he had no malice, but fired to defend himself."

John Adams: "I am for the prisoners at the bar, and shall apologize for it only in the

words of the Marquis Beccaria: 'If I can but be the instrument of preserving one life, his blessing and tears of transport, shall be sufficient consolation to me, for the contempt of all mankind.' . . . I shall take for granted, as a first principle, that the eight prisoners at the bar, had better be all acquitted, though we should admit them all to be guilty, than, that any one of them should by your verdict be found guilty, being innocent."

The law of self-defense is the "foundation" of liberty and property. "You must place yourselves in the situation of Wemms or Kilroy. Consider yourselves as knowing that . . . the people about you, thought you came to dragoon them into obedience to statutes, instructions, mandates, and edicts, which they thoroughly detested." He described in horrifying detail the scene in King Street, "the people shouting, huzzaing, and making the mob whistle as they call it, which when a boy makes it in the street, is no formidable thing, but when made by a multitude, is a most hideous shriek, almost as terrifying as an Indian yell."

Adams characterized the mob as mostly outsiders—not Bostonians. Further "in case of an unlawful assembly, all and everyone of the assembly is guilty of all and every unlawful act."

"We have been entertained with a great variety of phrases, to avoid calling this sort of people a mob. Some call them shavers, some call them genius's. The plain English is, gentlemen, most probably a motley rabble of saucy boys, negroes and molattoes, Irish teagues and outlandish jack tars. And why we should scruple to call such a set of people a mob, I can't conceive, unless the name is too respectable for them. The sun is not about to stand still or go out, nor the rivers to dry up because there was a mob in Boston on the 5th of March that attacked a party of soldiers. . . . Soldiers quartered in a populous town, will always occasion two mobs, where they prevent one. They are wretched conservators of the peace."

Montgomery had been struck down; struggling to his feet, he was struck again. "What could he do? Do you expect he should behave like a Stoick Philosopher lost in Apathy? . . . It is impossible you should find him guilty of murder."

The acts of outsiders: "This was the behavior of Attucks; to whose mad behavior, in all probability, the dreadful carnage of that night, is chiefly to be ascribed. And it is in this manner, this town has been often treated; a *Carr* from *Ireland*, and an *Attucks* from *Framingham*, happening to be here, shall sally out upon their thoughtless enterprizes, at the head of such rabble of Negroes, &c. as they can collect together, and then there are not wanting, persons to ascribe all their doings to the good people of the town."——Blame the dead outsiders; clear the Bostonians of causing the riots.

LEGACY

London Newspaper, 1771: "What is now the State of Society in the Town of Boston, that assumes to itself the Name of the Metropolis of America? No respect is paid to Government; no sense of Subordination; and from the want of some superior Power to cling to for protection, every Man is suspicious of his neighbour; whilst a few Demagogues harangue the People, and under the name of Liberty, lead them on to actions of violence, cruelty, and oppression; and Society seems altogether without order, without government; the Magistrate shrinks from his duty, and the Demagogues presume to dictate to the Judges on the seat of justice."

Chief Justice Peter Oliver: "We have hitherto passed through the different Forms of Governments, of Democracy & Oligarchy, down to Anarchy. We are now arrived to the last Stage of all, hitherto unknown in the political World, a *Dæmonocracy*."

Radicals pictured Richardson, Captain Preston and the soldiers as examples of justice cheated. A Tory placeman and British Redcoats had killed an innocent twelve-year old boy and the five martyrs of March 5.

Thomas Hutchinson: "The Counsel for the prisoners have done more to hurt the general cause in which they had been warmly engaged than they ever intended & I think it not impossible if they could have foreseen it they would have declined engaging or measures would have been taken to discourage them from it."

John Adams: Outcome was "exactly right."

British Response: In an attempt to establish the independence of the Massachusetts judiciary, Parliament passed a measure providing that the salaries of the governor, lt.-governor and the judges be paid from revenue collected from customs duties. The radicals charged that this innovation would eliminatge the independence of the judges and place them under the direct control of the imperial government.

THE ATTEMPT TO IMPEACH CHIEF JUSTICE PETER OLIVER

An Affair which happened, at the Close of the Year 1773, but was not brought into Effect until this Year 1774, mortified, chagrined, enraged & drove into right down Madness, *Adams* & all his Factious *Hydra.* It was a Grant from his Majesty, of a Salary to the Judges of the supreme Court. Such a Grant was in Contemplation some Years before, when Mr. *Charles Townshend*, was prime Minister; but his Death delayed it untill this Time. The true Reason of the Grant was this: the Judges of that Court had the shortest Allowance, from the generall Assembly, of any publick Officer; even the Door Keeper had a larger Stipend. The Judges Travel on their Circuits was generally about 1100 Miles in a Year, & some Times it had been 1500 Miles. Their Circuit Business engrossed seven Months in the Year, & the Extremities of Heat & Cold in that Climate were submitted to. For all this Service, the highest Grant made to them was £120 Sterling p. Year, & it had been much less. The Chief Justice had £30 Sterling more. This Grant was annually made, though sometimes postponed, & it depended upon the Humors of the prevailing Parties. A late worthy chief Justice, who had a confirmed Character for Sense & Integrity, lived almost in Penury, & at last died insolvent; & one Year, there was an attempt, in the Assembly, to deprive him of his extra £30 — because he had given an Opinion in Law,

upon the Bench, contrary to the Mind of a Partisan in the lower House of Assembly: but the Affair was dropped, lest it should fix a Stigma upon the House, of gross Partiality. The Assembly endeavored to keep the Judges in absolute Dependence upon their Humor; & because they found them rather too firm to coincide with their Views in the Subversion of Government, they made them the Objects of their Resentment; & in Order to express it, they made two new Counties, of 100 Miles more Travel, & shortened their Allowance £37.10 Sterling in the Whole: in short, they seemed disinclined to do Justice theirselves, or to suffer others to do it.

Several of the Judges had repeatedly represented their Cases to the generall Assembly, praying a further Allowance: & in Case it should be denied to them, because they might be disagreeable to the Assembly, or to the Body of the People, they were ready to resign their Office, to make Room for others who were in greater Esteem; but they were honored with no other Answer, but having their Memorials ordered to be laid on their Table.

His Majesty taking the Case of the Judges into his royal Consideration, from his known Justice & Benevolence, ordered them Salaries to be paid out of his Revenues in *America*; such Salaries as would keep them above Want & below Envy. This was striking at the Root of that Slavery which the Judges had always been held under; & to give up such an arbitrary, cruel & unjust Empire, did not comport with the Pride of the present ruling Powers; who now used every Art of suasion & cajoling by their Emissaries, & of Threatening from theirselves, in Order to rivet the Chains which they had only locked before. In Order to effectuate their Purpose, they made a Grant to four of the Judges equal to his Majesty's Grant; but they made it for one Year only. They knew that if this was accepted of, his Majesty's Grant would be forfeited of Course, & that the next Year they could return to their wonted Expedient, of attempting to bring them into a Compliance with their own Measures. To the chief Justice the Assembly granted an extra Sum, though very disproportionate to the Distinction his Majesty had made between him & the puisne Judges; but had their Grant to him been more than adequate to the King's Grant; he had too intimate a Knowledge of their past Conduct, to put any Confidence in

the Justice, Honor or Generosity of a *Massachusetts* Assembly.

The Faction, who were the prevailing part of the Assembly, were anxious to know the Minds of the Judges, & appointed a Committee to ask their Determination; but as the Judges had no official Information of his Majesty's Grant, they declined giving any Answer. This was towards the Close of the Year 1773, when the Term of the supreme Court was just finishing in *Boston*, where the general Court [the legislature] was then assembled. The Assembly were highly incensed at not receiving a categorical Answer from the Judges; they were just upon determining upon a Commitment of the whole Bench to Prison; but some of their *out-of-Door* Friends who had not breathed the pestilential Atmosphere of the Assembly Room, dissuaded the *with-door* Leaders of the Faction from such an illegal Step; since, if it was taken, they could have no Remedy in Law in their litigious Suits, which were too common in this Province. Thus the Matter subsided for the present; the supreme Court finished the Term, & the Judges returned to the respective Homes; & had the Assembly finished their Sessions, & returned to their *long* Homes, it is probable that Rebellion herself would have returned to *her long* Home with them.

The Judges upon hearing, sometime before, of his Majesty's gracious Intention of such a Grant, had agreed to accept it; but when the Dog Star raged with such a scorching Heat, four of them, who lived at and near that Focus of tarring & feathering, the town of *Boston*, flinched in the Day of Battle; they were so pelted with soothings on Day, & with Curses & Threatenings the Next, that they prudentially gave the Point up. One of the Judges, upon his Return home, sickened & died. The brutal Faction of the Assembly sent their Messenger to him, with Orders to deliver the Demand of an Answer to him personally, & receive his Answer; the Judge was within a few Hours of his Exit, when the Messenger arrived; he urged Admission to his dying Bed; it was granted, & he entered, & layed his Orders, in writing, upon the dying Man's Breast, who just declared his Non Acceptance of the King's Grant, & soon after expired.

The Chief Justice was now alone in the Combat: his case was peculiar; his Brethren had but lately been seated on the Bench. He had been 17 Years in the Service, & had sunk more than £2,000 Sterling in it. He had conversed with many of the Members

upon the Singularity of his Case, & had offered not to accept of the Grant (if his Majesty would permit him so to do) provided the Assembly would reimburse him on-half of his Loss in their Service; & further, that he would resign his Seat on the Bench. Upon this Representation of his Case, they advised him to take the King's Grant. This they did out of Doors; but there was so great Virtue in the Boards & plasitering of the Assembly Room, that upon setting their Feet over its Threshold, they at once changed Opinions.

The Chief Justice, very luckily lived above 30 Miles from *Boston*, or perhaps he would have followed the Suit of his Bretheren, in giving up the King's Grant; conformable to that only Truth which the Devil ever uttered, *Skin for Skin & all that a man hath will he give for his Life:* but he considered, that Mobs, when they set out on their Expeditions, generally get a Spur in their Heads; & as he lived at 30 Miles Distance from their Head Quarters, in all Probability they would want a Spur in their Heels before they could reach him. He was not disappointed in his Conjecture, for he remained quiet in his Recess, untill the Assembly met again, 2 or 3 Months after, & then the whole Pack opened. A Message was sent to him, by the lower House, signed, *Samuel Adams,* Clerk, requiring him to make explicit Answer, whether he would accept of the King's Grant, or of their Grant. He replied, that *he should accept the King's Grant* — nothing less than Destruction now awaited him. The Term of the supreme Court was now approaching — the Thunder Cloud gathered, black enough to crock Charcoal — instead of red, the Lightning flashed its white Streaks. There was a Gallery at a Corner of the Assembly Room where *Otis, Adams, Hawley,* & the rest of the Cabal used to crowd their Mohawks & Hawcubites, to echo the oppositional Vociferations, to the Rabble without doors. *Adams* now addressed his Gallery Men, to attack the Chief Justice when he came to Court; & they perfectly understood his Meaning. Even one of the Assembly Men, a Colo. *Gardiner*, who was afterward killed at the Battle of *Bunker's* Hill, declared in the general Assembly, that he himself would drag the chief Justice from the Bench if he should sit upon it. The Chief Justice's Friends wrote to him, that if he should go to Court his Life would be in Danger, but he not being conscious of such Danger; attempted to go, but a most severe Snow Storm happening the Night before his intended Journey, his Attempt the next Day,

after a Mile or two of Struggle through Snow Drifts, was prevented by the Impassableness of the Roads.

The next Day, one of Mr. *Adams's* right hand Men arrived, with a Message from the general Assembly, signed again by Mr. *Adams* as *Clerk*, prohibiting the chief Justice his coming to Court — he obeyed. The Messenger was a Person who had been obliged, by him to whom he delivered the Message, & apologized for his being the Bearer of it. On conversing with him, he wept at the Situation of this Affair; & frankly acknowledged, that if the chief Justice had gone to Court, he believed that he might have walked the Streets in the Day, but that he would not be safe in the Night. It being Dinner Time, the Messenger was asked to dine & refresh himself, after his Fatigue; but he refused; & assigned for a Reason that if they knew in *Boston* (& they would ask him) that he ate in that House, it would give great Offence. Thus these Christian *Liberty Men* resembled the inhabitants of *Judea*, in that malicious Principle of not eating with a *Samaritan*, as well as in a Worse, that of thinking they did *God* good Service in persecuting & destroying all those who dared to be of different Opinions from them. Like to what *Ben Johnson* said of *King James* the first, *their Souls seemed to have been born in an Ally.*

The Assembly, finding that the chief Justice did not go to *Boston*, to have his Brains beat out by their Rabble, they attacked him in a new Quarter, where he happened to be Invulnerable. They ordered the Records of the supreme Court to be laid before them, hoping to find some Malfeasance in his Office; but they were disappointed; & every Disappointment put them upon scratching their Heads for new Matter. At last, finding that they were pushed to Extremity, they sprung a Mine which involved theirselves in the intended Ruin of him. They drew up an Impeachment of him, as Inimical to his Country in taking the King's Grant, but at the same Time they did him the Honor of joining his Majesty with him in the Impeachment, as offering a Bribe to him, which he received. This was such an Insult to Majesty, that the Governor could not let it pass unnoticed, & accordingly closed the Matter against them. Thus ended all their legislative Attempts to ruin the chief Justice.

JUDICIAL REVIEW IN THE STATES
UNDER THE ARTICLES OF CONFEDERATION DURING THE 1780S

Rutgers v. Waddington, New York 1784

The Trespass Act (March 17, 1783) allowed owners of property to sue individuals who had occupied that property during the war, even if commanded to do so by the British commander in chief. Widow Elizabeth Rutgers sued Tory merchant Joshua Waddington, a British subject. Case was heard in the Mayor's Court of New York City presided over by Mayor James Duane. Alexander Hamilton was the defense attorney and Attorney General Egbert Benson represented the plaintiff. AH argued that the law was invalid because it violated America's treaty with Great Britain. The court did not declare that the Trespass Act was invalid, but expounded the act by equity to avoid an "unreasonable" effect in this particular case. In justifying the court's action, Duane recited the very passage from Blackstone that proclaimed the doctrine of parliamentary sovereignty but allowed courts to construe statutes by equity in certain instances. Despite this acknowledgment of legislative supremacy, the court's decision was denounced as "subversive of good order and the sovereignty of the state" and as contrary to the "nature and genius of our government." The court's equity decided that the act in denying the authority of the British commander in chief to permit occupation and use of property within his lines violated an accepted principle of the law of nations. Consequently Widow Rutgers lost her case.

Trevett v. Weeden, Rhode Island, 1786

Not really a true case of judicial review. James M. Varnum argued for the unconstitutionality of the Penalty Act of 1786 because it denied jury trial and it called for a special court without the right of appeal. The Superior Court ruled that it had no jurisdiction in the case because cases under it were to be decided by special courts. The legislature, however, called the justices before it to explain why they had ruled the law unconstitutional. Three of the five judges appeared before the legislature and defended

their decision. Judge David Howell said that it was beyond the legislature's power to judge the propriety of the court's ruling, because by such an act "the Legislature would become the supreme judiciary—a perversion of power totally subversive of liberty." Howell advocated an independent judiciary. Four of the five judges were not reappointed the next year.

Varnum's and Howell's arguments did not go unheard. On the eve of the 1787 general election, an anonymous correspondent in the *Providence Gazette* denounced the legislature's paper-money policies. "The Happines of Individuals, as well as the public Safety, depend more . . . on the Superior Court, than many People apprehend. They are a Shield, nay a Bulwark to their Fellow-Citizens, against all Kinds of Injustice and Oppression: It is not only their Duty to controul and restrain all inferior Courts and Tribunals, but to discern the Boundaries of the Power both of State and federal legislation."

The Providence town meeting went even further in stressing the importance of judicial review as the guardian of liberty. On April 28, 1787, this body of citizens declared: "The General Assembly are restrained and limited, in all their legislative acts, by the constitution. They are, in fact, the creature of the constitution; they are brought into existence thereby, empowered to act agreeably thereto, for a certain term, and then sink back again into the mass of their fellow-citizens: All their acts are liable to examination and scrutiny by the people, that is by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect. Here is the safety of rich and poor; here is a rampart thrown up against arbitrary power. . . . Precarious indeed would be the tenure of life, as well as of liberty and property, held at the mere will of a popular Assembly, sole judges of their own powers, of their own acts, and of the people's liberties."

Ten Pound Act, New Hampshire, 1786, 1787

In November 1785 the N.H. legislature passed a tender act allowing debtors to

use property as a tender. The Ten Pound Act authorized that cases up to ten pounds be decided by a justice of the peace rather than a jury. The act made it easier for creditors to sue, but also intended to relieve debtors of excessive demands on their time and efforts, as well as to avoid the expenses that attended an inferior court held only at certain times and in certain places, often distant from the homes of the parties involved. The traditional method provided jury trial for cases above forty shillings (£2). The N.H. Bill of Rights (1784) provided in Article 20 that jury trials be guaranteed as previously practiced. In five cases the Rockingham County court ruled the Ten Pound Act unconstitutional. The legislature voted on several occasions to reconfirm the Ten Pound Act and appointed a committee to initiate impeachment proceedings against the judges involved. The committee quickly reported that it could find no fault with the judges' interpretation of the constitution. The legislature repealed the Ten Pound Act on June 28, 1787.

Bayard v. Singleton, North Carolina, 1787

The Confiscation Act of 1785 prohibited courts from hearing suits to recover property derived from the confiscation process. Court ruled that the act was unconstitutional because Section 14 of the state Declaration of Rights provided for jury trials in all property cases. But the Court ruled that Bayard could not recover property that her father, a Loyalist, had consigned to her in 1777. As an alien, Bayard's father could not legally convey property to anyone. Singleton, who had previously purchased the property under the provision of the Confiscation Act, was allowed to keep property.

CONSTITUTIONAL CONVENTION

DEBATE OVER APPOINTMENT, TENURE AND SALARIES

The Judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Virginia Plan, 29 May 1787

. . . that a *national* government *ought to be established consisting of a supreme* Legislative, Executive and Judiciary. . . .

Committee of the Whole, 4 June 1787

. . . Resolved that a National Judiciary be established." It passed in the affirmative nem. con.

It was then moved and seconded to add these words . . . "to consist of one supreme tribunal, and of one or more inferior tribunals," which passed in the affirmative.

Committee of the Whole, 5 June 1787

[Ninth resolution, of the resolutions presented by Edmund Randolph (Va.) on May 29, as amended June 4: "Resolved that a National Judiciary be established to consist of one supreme tribunal, and of one or more inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. . . ."]

The words, "one or more" were struck out before "inferior tribunals" as an amendment to the last clause of the ninth Resolution. The Clause—"that the National Judiciary be chosen by the National Legislature," being under consideration.

James Wilson (Pa.) opposed the appointment of Judges by the National Legislature: Experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.

John Rutledge (S.C.) was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy. He was against establishing any national tribunal except a single supreme one. The State tribunals are most proper to decide in all cases in the first instance.

Benjamin Franklin (Pa.) observed that two modes of choosing the Judges had been mentioned, to wit, by the Legislature and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen, it being a point of great moment. He would mention one which he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves. It was here he said the interest of the electors to make the best choice, which should always be made the case if possible.

James Madison (Va.) disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies. It was known too that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment. On the other hand he was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch, as numerous enough to be confided in—as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments. He hinted this only and moved that the *appointment by the Legislature* might be struck out, and a blank left to be hereafter filled on maturer reflection. Mr. Wilson seconds it. On the question for

striking out. Massachusetts ay. Connecticut no. New York ay. New Jersey ay. Pennsylvania ay. Delaware ay. Maryland ay. Virginia ay. North Carolina ay. South Carolina no. Georgia ay.

James Wilson gave notice that he should at a future day move for a reconsideration of that clause which respects "inferior tribunals."

Charles Pinckney (S.C.) gave notice that when the clause respecting the appointment of the Judiciary should again come before the Committee he should move to restore the "appointment by the national Legislature."

The following clause of *the ninth resolution* were agreed to viz "to hold their offices during good behavior, and to receive punctually at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.

the remaining clause of the ninth Resolution was postponed. . . .

John Rutledge having obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that that part of the clause in the ninth Resolution should be expunged: arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States and creating unnecessary obstacles to their adoption of the new system.—Roger Sherman (Conn.) seconded the motion.

James Madison observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the Supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative

authority, was essential. A Government without a proper Executive and Judiciary would be the mere trunk of a body, without arms or legs to act or move.

James Wilson opposed the motion on like grounds, he said the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen.

Roger Sherman was in favor of the motion. He dwelt chiefly on the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose.

John Dickinson (Del.) contended strongly that if there was to be a National Legislature, there ought to be a national Judiciary, and that the former ought to have authority to institute the latter.

On the question for Mr. Rutledge's motion to strike out "inferior tribunals" it passed in the affirmative.

Massachusetts divided. Connecticut ay. New York divided. New Jersey ay. Pennsylvania no. Delaware no. Maryland no. Virginia no. North Carolina ay. South Carolina ay. Georgia ay.

James Wilson and James Madison then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add to the ninth resolution the words following "that the National Legislature be empowered to institute inferior tribunals." they observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them. They repeated the necessity of some such provision.

Pierce Butler (S.C.). The people will not bear such innovations. The States will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon who gave the Athenians not the best Government he could devise; but the best they would receive.

Rufus King (Mass.) remarked as to the comparative expense that the establishment of inferior tribunals would cost infinitely less than the appeals that would

be prevented by them.

On this question as moved by Mr. Wilson and Mr. Madison. Massachusetts ay. Connecticut no. New York divided. New Jersey ay. Pennsylvania ay. Delaware ay. Maryland ay. Virginia ay. North Carolina ay. South Carolina no. Georgia ay.

Committee of the Whole, 13 June 1787

Charles Pinckney and Roger Sherman moved to insert after the words "one supreme tribunal" the words "the Judges of which to be appointed by the national Legislature."

James Madison objected to an appointment by the whole Legislature. Many of them are incompetent Judges of the requisite qualifications. They were too influenced by partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment. He proposed that the appointment should be made by the Senate, which as a less numerous and more select body, would be more competent judges, and which was sufficiently numerous to justify such a confidence in them.

Mr. Sherman and Mr. Pinckney withdrew their motion, and the appointment by the Senate was agreed to nem. con. . . .

In Convention, 17 July 1787

James Madison. If it be essential to the preservation of liberty that the Legislative: Executive: and Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. The Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a reappointment. Why was it determined that the Judges should not hold their places by

such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the laws.

In Convention, 18 July 1787

On the clause "The Judges of which to be appointed by the second branch of the National Legislature."

Nathaniel Gorham (Mass.) would prefer an appointment by the second branch to an appointment by the whole Legislature; but he thought even that branch too numerous, and too little personally responsible, to ensure a good choice. He suggested that the Judges be appointed by the Executive with the advice and consent of the second branch, in the mode prescribed by the constitution of Massachusetts. This mode had been long practiced in that country, and was found to answer perfectly well.

James Wilson would still prefer an appointment by the Executive; but if that could not be attained, would prefer in the next place, the mode suggested by Mr. Gorham. He thought it his duty however to move in the first instance "that Judges be appointed by the Executive." Gouverneur Morris (Pa.) seconded the motion.

Luther Martin (Md.) was strenuous for an appointment by the second branch. Being taken from all the States it would be best informed of characters and most capable of making a fit choice.

Roger Sherman concurred in the observations of Mr. Martin, adding that the Judges ought to be diffused, which would be more likely to be attended to by the second branch, than by the Executive.

George Mason (Va.). The mode of appointing the Judges may depend in some degree on the mode of trying impeachments of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive. There were insuperable objections besides against referring the appointment to the Executive. He mentioned as one, that as the Seat of Government must be in some one State, and as the Executive would remain in office for a considerable time, 4, 5, or 6 years at least, he

would insensibly form local and personal attachments within the particular State that would deprive equal merit elsewhere, of an equal chance of promotion.

Nathaniel Gorham. As the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters. The Senators will be as likely to form their attachments at the seat of Government where they reside, as the Executive. If they can not get the man of the particular State to which they may respectively belong, they will be indifferent to the rest. Public bodies feel no personal responsibility, and give full play to intrigue and cabal. Rhode Island is a full illustration of the insensibility to character, produced by a participation of numbers, in dishonorable measures, and of the length to which a public body may carry wickedness and cabal.

Gouverneur Morris supposed it would be improper for an impeachment of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigues with the Legislature and an impartial trial would be frustrated. As they would be much about the Seat of Government they might even be previously consulted and arrangements might be made for a prosecution of the Executive. He thought therefore that no argument could be drawn from the probability of such a plan of impeachments against the motion before the House.

James Madison suggested that the Judges might be appointed by the Executive with the concurrence of one-third at least, of the second branch. This would unite the advantage of responsibility in the Executive with the security afforded in the second branch against any incautious or corrupt nomination by the Executive.

Roger Sherman was clearly for an election by the Senate. It would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate. For these reasons he thought there would be a better security for a proper choice in the Senate than in the Executive.

Edmund Randolph. It is true that when the appointment of the Judges was vested

in the second branch an equality of votes had not been given to it. Yet he had rather leave the appointment there than give it to the Executive. He thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal. He thought too that the hope of receiving appointments would be more diffusive if they depended on the Senate, the members of which would be diffusively known, than if they depended on a single man who could not be personally known to a very great extent; and consequently that opposition to the System, would be so far weakened.

Gunning Bedford (Del.) thought there were solid reasons against leaving the appointment to the Executive. He must trust more to information than the Senate. It would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens. The responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes.

Nathaniel Gorham remarked that the Senate could have no better information than the Executive. They must like him, trust to information from the members belonging to the particular State where the Candidates resided. The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone. He did not mean that he would be answerable under any other penalty than that of public censure, which with honorable minds was a sufficient one.

On the question for referring the appointment of the Judges to the Executive, instead of the second branch

Massachusetts ay. Connecticut no. Pennsylvania ay. Delaware no. Maryland no. Virginia no. North Carolina no. South Carolina no.—Georgia absent.

Nathaniel Gorham moved "that the Judges be nominated and appointed by the Executive by and with the advice and consent of the second branch and every such nomination shall be made at least days prior to such appointment." This mode he said had been ratified by the experience of 140 years in Massachusetts. If the appointment should be left to either branch of the Legislature, it will be a mere piece of jobbing.

Gouverneur Morris seconded and supported the motion.

Roger Sherman thought it less objectionable than an absolute appointment by the Executive, but disliked it as too much fettering the Senate.

On the question on Mr. Gorham's motion

Massachusetts ay. Connecticut no. Pennsylvania ay. Delaware no. Maryland ay. Virginia ay. North Carolina no. South Carolina no. Georgia absent.

James Madison moved that the Judges should be nominated by the Executive, and such nomination should become an appointment if not disagreed to within days by two-thirds of the second branch. Mr. Gouverneur Morris seconded the motion. By common consent the consideration of it was postponed till tomorrow.

"To hold their offices during good behavior" and "to receive fixed salaries" agreed to nem. con.

"In which [salaries of Judges] no increase or diminution shall be made so as to affect the persons actually in office at the time."

Gouverneur Morris moved to strike out "or increase." He thought the Legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the Judges.

Benjamin Franklin was in favor of the motion. Money may not only become plentier, but the business of the department may increase as the Country becomes more populous.

James Madison. The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits, to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented. The variations in the value of money, may be guarded against by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are doing it. An increase of salaries may be easily so contrived as not to affect persons in office.

Gouverneur Morris. The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners and the style of living in a Country. The increase of business can not, be provided for in the supreme tribunal in the way that has been mentioned. All the business of a certain description whether more or less must be done in that single tribunal. Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.

On the question for striking out "or increase."

Massachusetts ay. Connecticut ay. Pennsylvania ay. Delaware ay. Maryland ay. Virginia no. North Carolina no. South Carolina ay. Georgia absent.

The clause as amended was then agreed to nem con.

The whole clause as amended was then agreed to nem. con.

The twelfth Resolution "that the National Legislature be empowered to appoint inferior tribunals" being taken up

Pierce Butler could see no necessity for such tribunals. The State Tribunals might do the business.

Luther Martin concurred. They will create jealousies and oppositions in the State tribunals, with the jurisdiction of which they will interfere.

Nathaniel Gorham. There are in the States already federal Courts with jurisdiction for trial of piracies &c. committed on the Seas. No complaints have been made by the States or the Courts of the States. Inferior tribunals are essential to render the authority of the National Legislature effectual.

Edmund Randolph observed that the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General and local policy at variance.

Gouverneur Morris urged also the necessity of such a provision.

Roger Sherman was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done, with safety to the general

interest.

George Mason thought many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary.

On the question for agreeing to the twelfth Resolution empowering the National Legislature to appoint "inferior tribunals," it was agreed to nem. con.

In Convention, 20 July 1787

Rufus King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments of Governments should be separate and indepedent: that the Executive and Judiciary should be so as well as the Legislative: tghat the Executive should be so equally with the Judiciary. Would this ne the case, if the Executive should be impeachable? It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places not for a limited time, but during good behavior. It is necessary therefore that a forum should be established for trying misbehavior.

In Convention, 21 July 1787

The motion made by Mr. Madison on the eighteenth of July and then postponed, "that the Judges should be nominated by the Executive and such nomination become appointments unless disagreed to by two-thirds of the second branch of the Legislature," was now resumed.

James Madison stated as his reasons for the motion. First, that it secured responsibility of the Executive who would in general be more capable and likely to select fit characters than the Legislature, or even the second branch of it, who might hide their selfish motives under the number concerned in the appointment. —Secondly, that in case of any flagrant partiality or error, in the nomination it might be fairly presumed that two-thirds of the second branch would join in putting a negative on it. Thirdly, that as the second branch was very differently constituted when the appointment of the Judges was

formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that there should be a concurrence of two authorities, in one of which the people, in the other the States, should be represented, The Executive Magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States. If the second branch alone should have this power, the Judges might be appointed by a minority of the people, though by a majority of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States: and as it would moreover throw the appointments entirely into the hands of the Northern States, a perpetual ground of jealousy and discontent would be furnished to the Southern States.

Charles Pinckney was for placing the appointment in the second branch exclusively. The Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust.

Edmund Randolph would have preferred the mode of appointment proposed formerly by Mr. Gorham, as adopted in the Constitution of Massachusetts but thought the motion depending so great an improvement of the clause as it stands, that he anxiously wished it success. He laid great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications. The same inconveniencies will proportionally prevail, if the appointments be referred to either branch of the Legislature or to any other authority administered by a number of individuals.

Oliver Ellsworth (Conn.) would prefer a negative in the Executive on a nomination by the second branch, the negative to be overruled by a concurrence of two-thirds of the second branch to the mode proposed by the motion; but preferred an absolute appointment by the second branch to either. The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary it was not to be supposed he could have a better

knowledge of characters. He will be more open to caresses and intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment.

Gouverneur Morris supported the motion. First, the States in their corporate capacity will frequently have an interest staked on the determination of the Judges. As in the Senate the States are to vote the Judges ought not to be appointed by the Senate. Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge. Secondly, it had been said the Executive would be uninformed of characters. The reverse was the truth. The Senate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the U.S. required by the nature of his administration, will or may have the best possible information. Thirdly, it had been said that a jealousy would be entertained of the Executive. If the Executive can be safely trusted with the command of the army, there cannot surely be any reasonable ground of Jealousy in the present case. He added that if the objections against an appointment of the Executive by the Legislature, had the weight that had been allowed there must be some weight in the objection to an appointment of the Judges by the Legislature or by any part of it.

Elbridge Gerry (Mass.). The appointment of the Judges like every other part of the Constitution should be so modelled as to give satisfaction both to the people and to the States. The mode under consideration will give satisfaction to neither. He could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate. It appeared to him also a strong objection that two-thirds of the Senate were required to reject a nomination of the Executive. The Senate would be constituted in the same manner as Congress. And the appointments of Congress have been generally good.

James Madison observed that he was not anxious that two-thirds should be necessary to disagree to a nomination. He had given this form to his motion chiefly to vary it the more clearly from one which had just been rejected. He was content to obviate the objection last made, and accordingly so varied the motion as to let a majority reject.

George Mason found it his duty to differ from his colleagues in their opinions and reasonings on this subject. Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive and Senate, the appointment was substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations. He considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself. He did not think the difference of interest between the Northern and Southern States could be properly brought into this argument. It would operate and require some precautions in the case of regulating navigation, commerce and imposts; but he could not see that it had any connection with the Judiciary department.

On the question, the motion being now "that the executive should nominate, and such nominations should become appointments unless disagreed to by the Senate."

Massachusetts ay. Connecticut no. Pennsylvania ay. Delaware no. Maryland no. Virginia ay. North Carolina no. South Carolina no. Georgia no.

On the question for agreeing to the clause as it stands by which the Judges are to be appointed by the second branch

Massachusetts no. Connecticut ay. Pennsylvania no. Delaware ay. Maryland ay. Virginia no. North Carolina ay. South Carolina ay. Georgia ay.

In Convention, Committee of Detail Report, 6 August 1787

Article IX, Section 1. The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court. . . .

In Convention, 20 August 1787

Elbridge Gerry moved "that the Committee of Detail be instructed to report . . . a mode of trying the Supreme Judges in cases of impeachment. . . .

In Convention, 22 August 1787

[Report of the Committee amending the report of the Committee of Detail]

"At the end of the second section of the eleventh article, add, 'the judges of the supreme court shall be triable by the senate, on impeachment by the house of representatives. . . .' "

In Convedntion, 23 August 1787

Gouverneur Morris argued . . . if Judges were to be tried by the Senate according to a late report of a Committee it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.

In Convention, 27 August 1787

John Dickinson (Del.) moved as an amendment to section 2, article XI after the words "good behavior" the words "provided that they may be removed by the Executive on the application by the Senate and House of Representatives."

Elbridge Gerry seconded the motion.

Gouverneur Morris thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removable without a trial. Besides it was fundamentally wrong to subject Judges to so arbitrary an authority.

Roger Sherman saw no contradiction or impropriety if this were made part of the constitutional regulation of the Judiciary establishment. He observed that a like provision was contained in the British Statutes.

John Rutledge. If the Supreme Court is to judge between the U.S. and particular States, this alone is an insuperable objection to the motion.

James Wilson considered such a provision in the British Government as less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had *successively* offended by his independent conduct, both houses of Parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our

Government.

Edmund Randolph opposed the motion as weakening too much the independence of the Judges.

John Dickinson was not apprehensive that the Legislature composed of different branches constructed on such different principles, would improperly unite for the purpose of displacing a Judge.

On the question for agreeing to Mr. Dickinson"s Motion. It was negatived, Connecticut aye; all the other States present, no.

James Madison and James McHenry (Md.) moved to reinstate the words "increased or" before the word "diminished."

Gouverneur Morris opposed it for reasons urged by him on a former occasion—

George Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Charles Cotesworth Pinckney (S.C.). The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can afford in the first instance. He was not satisfied with the expedient mentioned by Colonel Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Gouverneur Morris said the expedient might be evaded and therefore amounted to nothing. Judges might resign, and then be reappointed to increased salaries.

On the question

New Hampshire no. Connecticut no. Pennsylvania no. Delaware no. Maryland divided. Virginia ay. South Carolina no. Georgia absent also Massachusetts, New Jersey and North Carolina.

Edmund Randolph and James Madison then moved to add the following words . . . "nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof."

On this question

New Hampshire no. Connecticut no. Pennsylvania no. Delaware no. Maryland ay. Virginia bay. South Carolina no. Georgia absent also Massachusetts, New Jersey and North Carolina.

In Convention, 31 August 1787

Referred to a grand committee all the sections of the system under postponement and a report of a committee of 5 with several motions.

In Convention, 4 September 1787

David Brearley from the Committee of Eleven made a further partial Report as follows: . . .

The President . . . with the advice and consent of the Senate shall appoiont ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U.S., whose appointments are not otherwise herein provided for.

CONSTITUTIONAL CONVENTION

DEBATE OVER A COUNCIL OF REVISION

The Virginia Plan, 29 May 1787

Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by _____ of the members of each branch.

Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

Saturday, 21 July 1787

James Wilson (Pa.) moved as an amendment to Resolution 10 that the supreme National Judiciary should be associated with the Executive in the Revisionary power." This proposition had been before made and failed: but he was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort: The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of

the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.

James Madison (Va.) seconded the motion.

Nathaniel Gorham (Mass.) did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded. He thought it would be best to let the Executive alone be responsible, and at most to authorize him to call on Judges for their opinions.

Oliver Ellsworth (Conn.) approved heartily of the motion. The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.

James Madison considered the object of the motion as of great importance to the meditated Constitution. It would be useful to the Judiciary department by giving it an additional opportunity of defending itself against Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion

of our calamities. If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength either to the Executive or Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

George Mason (Va.) said he had always been a friend to this provision. It would give a confidence to the Executive, which he would not otherwise have, and without which the Revisionary power would be of little avail.

Elbridge Gerry (Mass.) did not expect to see this point which had undergone full discussion, again revived. The object he conceived of the Revisionary power was merely to secure the Executive department against legislative encroachment. The Executive therefore who will best know and be ready to defend his rights ought alone to have the defence of them. The motion was liable to strong objections. It was combining & mixing together the Legislative & the other departments. It was establishing an improper coalition between the Executive & Judiciary departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It was making the Expositors of the Laws, the Legislators which ought never to be done. A better expedient for correcting the laws, would be to appoint as had been done in Pennsylvania a person or persons of proper skill, to draw bills for the Legislature.

Caleb Strong (Mass.) thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.

Gouverneur Morris (Pa.). Some check being necessary on the Legislature, the

question is in what hands it should be lodged. On one side it was contended that the Executive alone ought to exercise it. He did not think that an Executive appointed for 6 years, and impeachable whilst in office would be a very effectual check. On the other side it was urged that he ought to be reinforced by the Judiciary department. Against this it was objected that Expositors of laws ought to have no hand in making them, and arguments in favor of this had been drawn from England. What weight was due to them might be easily determined by an attention to facts. The truth was that the Judges in England had a great share in ye. Legislation. They are consulted in difficult & doubtful cases. They may be & some of them are members of the Legislature. They are or may be members of the privy Council, and can there advise the Executive as they will do with us if the motion succeeds. The influence the English Judges may have in the latter capacity in strengthening the Executive check can not be ascertained, as the King by his influence in a manner dictates the laws. There is one difference in the two Cases however which disconcerts all reasoning from the British to our proposed Constitution. The British Executive has so great an interest in his prerogatives and such powerful means of defending them that he will never yield any part of them. The interest of our Executive is so inconsiderable & so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting encroachments. He was extremely apprehensive that the auxiliary firmness & weight of the Judiciary would not supply the deficiency. He concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on as the proper Guardians of liberty. The answer was short and conclusive. Either bad laws will be pushed or not. On the latter supposition no check will be wanted. On the former a strong check will be necessary: And this is the proper supposition. Emissions of paper money, largesses to the people — a remission of debts and similar measures, will at some times be popular, and will be pushed for that reason At other times such measures will coincide with the interests of the Legislature themselves, & that will be a reason not less cogent for pushing them. It may be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson. The press is indeed a

great means of diminishing the evil, yet it is found to be unable to prevent it altogether.

Luther Martin (Md.). Considered the association of the Judges with the Executive as a dangerous innovation; as well as one which could not produce the particular advantage expected from it. A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature. Besides in what mode & proportion are they to vote in the Council of Revision?

James Madison could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to be kept separate & distinct. On the contrary he thought it an auxiliary precaution in favor of the maxim If a Constitutional discrimination of the departments on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate. The most regular example of this theory was in the British Constitution. Yet it was not only the practice there to admit the Judges to a seat in the legislature, and in the Executive Councils, and to submit to their previous examination all laws of a certain description, but it was a part of their Constitution that the Executive might negative any law whatever; a part of their Constitution which had been universally regarded as calculated for the preservation of the whole. The objection against a union of the Judiciary & Executive

branches in the revision of the laws, had either no foundation or was not carried far enough. If such a Union was an improper mixture of powers, or such a Judiciary check on the laws, was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.

George Mason observed that the defence of the Executive was not the sole object of the Revisionary power. He expected even greater advantages from it. Notwithstanding the precautions taken in the Constitution of the Legislature, it would still so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws; but would discourage demagogues from attempting to get them passed. It had been said [by Mr. L. Martin] that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.

James Wilson. The separation of the departments does not require that they should have separate objects but that they should act separately tho' on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object.

Elbridge Gerry had rather give the Executive an absolute negative for its own defence than thus to blend together the Judiciary & Executive departments. It will bind them together in an offensive and defensive alliance against the Legislature, and render the latter unwilling to enter into a contest with them.

Gouverneur Morris was surprised that any defensive provision for securing the effectual separation of the departments should be considered as an improper mixture of them. Suppose that the three powers, were to be vested in three persons, by compact among themselves; that one was to have the power of making, another of executing, and a third of judging, the laws. Would it not be very natural for the two latter after having settled the partition on paper, to observe, and would not candor oblige the former to admit, that as a security against legislative acts of the former which might easily be so framed as to undermine the powers of the two others, the two others ought to be armed with a veto for their own defence, or at least to have an opportunity of stating their objections against acts of encroachment? And would any one pretend that such a right tended to blend & confound powers that ought to be separately exercised? As well might it be said that If three neighbours had three distinct farms, a right in each to defend his farm against his neighbours, tended to blend the farms together.

Nathaniel Gorham. All agree that a check on the Legislature is necessary. But there are two objections against admitting the Judges to share in it which no observations on the other side seem to obviate. the 1st. is that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them. 2d. that as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.

James Wilson. The proposition is certainly not liable to all the objections which have been urged against it. According [to Mr. Gerry] it will unite the Executive & Judiciary in an offensive & defensive alliance against the Legislature. According to Mr. Gorham it will lead to a subversion of the Executive by the Judiciary influence. To the first gentleman the answer was obvious; that the joint weight of the two departments was necessary to balance the single weight of the Legislature. To the 1st. objection stated by the other Gentleman it might be answered that supposing the prepossession to mix itself with the exposition, the evil would be overbalanced by the advantages promised by the expedient. To the 2d. objection, that such a rule of voting might be provided in the detail

as would guard against it.

John Rutledge (S.C.) thought the Judges of all men the most unfit to be concerned in the revisionary Council. The Judges ought never to give their opinion on a law till it comes before them. He thought it equally unnecessary. The Executive could advise with the officers of State, as of war, finance &c. and avail himself of their information & opinions.

On Question on Mr. Wilson's motion for joining the Judiciary in the Revision of laws it passed in the negative — Massachusetts no, Connecticut ay, New Jersy not present, Pennsylvania divided, Delaware no, Maryland ay, Virginia ay, North Carolina no, South Carolina no, Georgia divided.

THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION

THE JUDICIARY

ANTIFEDERALISTS VIEWED *the federal judiciary as another source of danger to individual liberty and to the independent existence of the states. They were concerned that the judicial power of the United States would compromise the right to trial by jury in civil cases: though the Constitution guaranteed jury trials in criminal cases, it said nothing about civil cases. Even in criminal cases, the Constitution did not guarantee juries of the "vicinage," but only that trials would take place in the state in which a crime was committed. This might entail a distance of hundreds of miles. And in matters that might come before the Supreme Court, travel of thousands of miles would be involved.*

The Constitution gave the federal courts appellate jurisdiction not only in matters of law, which was traditional, but also in determining matters of fact that would normally have been decided by a jury in the lower court. This profoundly disturbed Antifederalists as another threat to the jury system.

Antifederalists worried that the jurisdiction of the federal courts was too broad, and as federal power grew, which they believed was inevitable, more cases would be taken to federal courts rather than state courts, thus reducing the importance of the state courts. They expected the federal courts to encourage their own aggrandizement of power. As interpreters of the ambiguities in the Constitution, federal courts would accrue more power to themselves as they allowed federal power to expand at state expense.

Federalists responded that of the three branches, the judicial branch was the "least dangerous," because it had the power only of judgment. They denied that jury trials were always necessary or were endangered, either by the silence of the Constitution or by the appellate jurisdiction of the federal courts in matters of fact. They defended the jurisdiction of the federal courts as the only means to provide justice in foreign and interstate cases, and to impose uniform obedience to the Constitution and to federal law. Federalists viewed the courts as the intermediary between the people and the Congress. The courts, through judicial review, would uphold the Constitution against the attempts by Congress to enlarge its power. As such, it was a protector of the people, not a danger.

Antifederalist

BRUTUS XI
New York Journal, 31 January 1788

The nature and extent of the judicial power of the United States, proposed to be granted by this constitution, claims our particular attention.

Much has been said and written upon the subject of this new system on both sides, but I have not met with any writer, who has discussed the judicial powers with any degree of accuracy. And yet it is obvious, that we can form but very imperfect ideas of the manner in which this government will work, or the effect it will have in changing the internal police and mode of distributing justice at present subsisting in the respective states, without a thorough investigation of the powers of the judiciary and of the manner in which they will operate. This government is a complete system, not only for making, but for executing laws. And the courts of law, which will be constituted by it, are not only to decide upon the constitution and the laws made in pursuance of it, but by officers subordinate to them to execute all their decisions. The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power. It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.

The only causes for which they can be displaced, is, conviction of treason, bribery, and high crimes and misdemeanors.

This part of the plan is so modelled, as to authorise the courts, not only to carry into execution the powers expressly given, but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions.

That we may be enabled to form a just opinion on this subject, I shall, in considering it,

1st. Examine the nature and extent of the judicial powers—and

2d. Enquire, whether the courts who are to exercise them, are so constituted as to afford reasonable ground of confidence, that they will exercise them for the general good.

With a regard to the nature and extent of the judicial powers, I have to regret my want of capacity to give that full and minute explanation of them that the subject merits. To be able to do this, a man should be possessed of a degree of law knowledge far beyond what I pretend to. A number of hard words and technical phrases are used in this part of the system, about the meaning of which gentlemen learned in the law differ.

Its advocates know how to avail themselves of these phrases. In a number of instances, where objections are made to the powers given to the judicial, they give such an explanation to the technical terms as to avoid them.

Though I am not competent to give a perfect explanation of the powers granted to this department of the government, I shall yet attempt to trace some of the leading features of it, from which I presume it will appear, that they will operate to a total subversion of the state judiciaries, if not, to the legislative authority of the states.

In article 3d, sect. 2d, it is said, "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c."

The first article to which this power extends, is, all cases in law and equity arising under this constitution.

What latitude of construction this clause should receive, it is not easy to say. At first view, one would suppose, that it meant no more than this, that the courts under the general government should exercise, not only the powers of courts of law, but also that of courts of equity, in the manner in which those powers are usually exercised in the different states. But this cannot be the meaning, because the next clause authorises the courts to take cognizance of all cases in law and equity arising under the laws of the United States; this last article, I conceive, conveys as much power to the general judicial as any of the state courts possess.

The cases arising under the constitution must be different from those arising under the laws, or else the two clauses mean exactly the same thing.

The cases arising under the constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it.

This article, therefore, vests the judicial with a power to resolve all questions that may arise on any case on the construction of the constitution, either in law or in equity.

1st. They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.

2d. The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.

"From this method of interpreting laws (says Blackstone) by the reason of them, arises what we call equity;" which is thus defined by Grotius, "the correction of that, wherein the law, by reason of its universality, is deficient; for since in laws all cases cannot be foreseen, or expressed, it is necessary, that when the decrees of the law cannot be applied to particular cases, there should some where be a power vested of defining those circumstances, which had they been foreseen the legislator would have expressed; and these are the cases, which according to Grotius, lex non exacte definit, sed arbitrio boni viri permittet."

The same learned author observes, "That equity, thus depending essentially upon each individual case, there can be no established rules and fixed principles of equity laid down, without destroying its very essence, and reducing it to a positive law."

From these remarks, the authority and business of the courts of law, under this clause, may be understood.

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the

force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them. They have therefore no more right to set aside any judgment pronounced upon the construction of the constitution, than they have to take from the president, the chief command of the army and navy, and commit it to some other person. The reason is plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controulable by the other, they are altogether independent of each other.

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations.

1st. The constitution itself strongly countenances such a mode of construction. Most of the articles in this system, which convey powers of any considerable importance, are conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning. The two most important powers committed to any government, those of raising money, and of raising and keeping up troops, have already been considered, and shewn to be unlimitted by any thing but the discretion of the legislature. The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution,* it has been shewn, leaves the legislature at liberty, to do every thing, which in their judgment is best. It is said, I know, that this clause confers no power on the legislature, which they would not have had without it—though I believe this is not the fact, yet, admitting it to be, it implies that the constitution is not to receive an explanation strictly, according to its letter; but more

*Article I, section 8, last clause.

power is implied than is expressed. And this clause, if it is to be considered, as explanatory of the extent of the powers given, rather than giving a new power, is to be understood as declaring, that in construing any of the articles conveying power, the spirit, intent and design of the clause, should be attended to, as well as the words in their common acceptation.

This constitution gives sufficient colour for adopting an equitable construction, if we consider the great end and design it professedly has in view—there appears from its preamble to be, "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and posterity." The design of this system is here expressed, and it is proper to give such a meaning to the various parts, as will best promote the accomplishment of the end; this idea suggests itself naturally upon reading the preamble, and will countenance the court in giving the several articles such a sense, as will the most effectually promote the ends the constitution had in view—how this manner of explaining the constitution will operate in practice, shall be the subject of future enquiry.

2d. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpared to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it; and that they will do it, appears probable.

3d. Because they will have precedent to plead, to justify them in it. It is well known, that the courts in England, have by their own authority, extended their jurisdiction far beyond the limits set them in their original institution, and by the laws of the land.

The court of exchequer is a remarkable instance of this. It was originally intended principally to recover the king's debts, and to order the revenues of the crown. It had a common law jurisdiction, which was

established merely for the benefit of the king's accomptants. We learn from Blackstone, that the proceedings in this court are grounded on a writ called quo minus, in which the plaintiff suggests, that he is the king's farmer or debtor, and that the defendant hath done him the damage complained of, by which he is less able to pay the king. These suits, by the statute of Rutland [1282], are expressly directed to be confined to such matters as specially concern the king, or his ministers in the exchequer. And by the articuli super cartas [1300], it is enacted, that no common pleas be thenceforth held in the exchequer contrary to the form of the great charter: but now any person may sue in the exchequer. The surmise of being debtor to the king being matter of form, and mere words of course; and the court is open to all the nation.

When the courts will have a president [precedent] before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any controul?

This power in the judicial, will enable them to mould the government, into almost any shape they please.—The manner in which this may be effected we will hereafter examine.

FEDERAL FARMER
c. 8 November 1787 (excerpt)

There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, I mean powers respecting questions arising upon the internal laws of the respective states. It is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union. By Art. 3. Sect. 2. the powers of the federal judiciary are extended (among other things) to all cases between a state and citizens of another state—between citizens of different states—between a state or the citizens thereof, and foreign states, citizens or subjects. Actions in all these cases, except against a state government, are now brought and finally determined in the law courts of the states respectively; and as there are no words to exclude these courts of their jurisdiction in these cases, they will have concurrent jurisdiction with the inferior federal courts in them; and, therefore, if the new constitution be adopted without any amendment in this respect, all those numerous actions, now brought in the state courts between our citizens and foreigners, between citizens of different states, by state governments against foreigners, and by state governments against

citizens of other states, may also be brought in the federal courts; and an appeal will lay in them from the state courts, or federal inferior courts, to the supreme judicial court of the union. In almost all these cases, either party may have the trial by jury in the state courts; excepting paper money and tender laws, which are wisely guarded against in the proposed constitution; justice may be obtained in these courts on reasonable terms; they must be more competent to proper decisions on the laws of their respective states, than the federal courts can possibly be. I do not, in any point of view, see the need of opening a new jurisdiction to these causes—of opening a new scene of expensive law suits—of suffering foreigners, and citizens of different states, to drag each other many hundred miles into the federal courts. It is true, those courts may be so organized by a wise and prudent legislature, as to make the obtaining of justice in them tolerably easy; they may in general be organized on the common law principles of the country: But this benefit is by no means secured by the constitution. The trial by jury is secured only in those few criminal cases, to which the federal laws will extend—as crimes committed on the seas against the laws of nations, treason and counterfeiting the federal securities and coin: But even in these cases, the jury trial of the vicinage is not secured, particularly in the large states, a citizen may be tried for a crime committed in the state, and yet tried in some states 500 miles from the place where it was committed; but the jury trial is not secured at all in civil causes. Though the convention have not established this trial, it is to be hoped that congress, in putting the new system into execution, will do it by a legislative act, in all cases in which it can be done with propriety. Whether the jury trial is not excluded [in] the supreme judicial court, is an important question. By Art. 3. Sect. 2. all cases affecting ambassadors, other public ministers, and consuls, and in those cases in which a state shall be party, the supreme court shall have jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to LAW and FACT, with such exception, and under such regulations, as the congress shall make. By court is understood a court consisting of judges; and the idea of a jury is excluded. This court, or the judges, are to have jurisdiction on appeals, in all the cases enumerated, as to law and fact; the judges are to decide the law and try the fact, and the trial of the fact being assigned to the judges by the constitution, a jury for trying the fact is excluded; however, under the exceptions and powers to make regulations, Congress may, perhaps, introduce the jury, to try the fact in most necessary cases.

There can be but one supreme court in which the final jurisdiction will centre in all federal causes—except in cases where appeals by law shall not be allowed: The judicial powers of the federal courts extends in law and equity to certain cases: and, therefore, the powers to determine

on the law, in equity, and as to the fact, all will concentre in the supreme court:—These powers, which by this constitution are blended in the same hands, the same judges, are in Great-Britain deposited in different hands—to wit, the decision of the law in the law judges, the decision in equity in the chancellor, and the trial of the fact in the jury. It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions as in equity in Great-Britain; equity, therefore, in the supreme court for many years, will be mere discretion. I confess in the constitution of the supreme court, as left by the constitution, I do not see a spark of freedom or a shadow of our own or the British common law.

This court is to have appellate jurisdiction in all the other cases before mentioned: Many sensible men suppose that cases before-mentioned respect, as well the criminal cases as the civil ones, mentioned antecedently in the constitution, if so an appeal is allowed in criminal cases—contrary to the usual sense of law. How far it may be proper to admit a foreigner or the citizen of another state to bring actions against state governments, which have failed in performing so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to bring it to answer to an individual in a court of law, is worthy of consideration; the states are now subject to no such actions; and this new jurisdiction will subject the states, and many defendants to actions, and processes, which were not in the contemplation of the parties, when the contract was made; all engagements existing between citizens of different states, citizens and foreigners, states and foreigners; and states and citizens of other states were made the parties contemplating the remedies then existing on the laws of the states—and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever.

CENTINEL II (SAMUEL BRYAN)
Philadelphia *Freeman's Journal*, 24 October 1787 (excerpt)*

Such a body as the intended Congress, unless particularly inhibited and restrained, must grasp at omnipotence, and before long swallow up the Legislative, the Executive, and the Judicial powers of the several States.

*This was the second of eighteen essays signed "Centinel" that appeared in the Philadelphia *Independent Gazetteer* and *Freeman's Journal* between 5 October and 9 April 1788. Contemporaries incorrectly attributed the essays to George Bryan, one of the leaders of the state

In addition to the respectable authorities quoted in my first number, to shew that the right of *taxation* includes all the powers of government, I beg leave to adduce the Farmer's Letters, see particularly letter 9th, in which Mr. Dickinson* has clearly proved, that if the British Parliament assumed the power of taxing the colonies, *internally*, as well as *externally*, and it should be submitted to, the several colony legislatures would soon become contemptible, and before long fall into disuse.—Nothing, says he, would be left for them to do, higher than to frame bye-laws for empounding of cattle or the yoking of hogs.

By the proposed plan, there are divers cases of judicial authority to be given to the courts of the United States, besides the two mentioned by Mr. *Wilson*.†—In maritime causes about property, jury trial has not been usual; but in suits in *equity*, with all due deference to Mr. *Wilson*'s professional abilities, (which he calls to his aid) jury trial, as to facts, is in full exercise. Will this jurisperitus say that if the question in equity should be, did *John Doe* make a will, that the chancellor of England would decide upon it? He well knows that in this case, there being no mode of jury trial before the chancellor, the question would be referred to the court of king's bench for discussion according to the common law, and when the judge in equity should receive the *verdict*, the fact so established, could never by re-examined or controverted. Maritime causes and those appertaining to a court of equity, are, however, but *two* of the many and extensive subjects of federal cognizance mentioned in the plan. This jurisdiction will embrace all suits arising under the laws of impost, excise and other revenue of the United States. In England if goods be seized, if a ship be prosecuted for non-compliance with, or breach of the laws of the customs, or those for regulating trade, in the court of exchequer, the claimant is secured of the transcendent privilege of Englishmen, *trial by a jury of his peers*. Why not in the United States of America? This jurisdiction also goes to all cases under the laws of the United States, that is to say, under all statutes and ordinances of Congress. How far this may extend, it is easy to foresee; for upon the decay of the state powers of legislation, in consequence of the loss of the *purse strings*, it will be found necessary for the federal legislature to make laws upon every subject of legislation. Hence the state courts of justice, like the barony and hundred courts of England, will be eclipsed and gradually fall into disuse.

Constitutionalist Party and a justice of the state supreme court. Samuel Bryan was his son, and was a clerk of the Assembly, 1784–86. "Centinel" II was reprinted six times by 13 December: Mass. (1), R.I. (1), N.Y. (2), Md. (1), Va. (1). It was also printed as a broadside in Philadelphia and New York, and in pamphlet anthologies in New York and Richmond.

*John Dickinson's "Letters from a Farmer in Pennsylvania" were printed in the *Pennsylvania Chronicle* in 1767–68.

†A reference to James Wilson's 6 October speech.

The jurisdiction of the federal court goes, likewise, to the laws to be created by treaties, made by the President and Senate, (a species of legislation) with other nations; "to all cases affecting foreign ministers and consuls; to controversies wherein the United States shall be a party; to controversies between citizens of different states,"* as when an inhabitant of *New-York* has a demand on an inhabitant of *New-Jersey*.—This last is a very invidious jurisdiction, implying an improper distrust of the impartiality and justice of the tribunals of the states. It will include all legal debates between foreigners in Britain, or elsewhere, and the people of this country.—A reason hath been assigned for it, viz. "That large tracts of land, in neighbouring states, are claimed under royal or other grants, disputed by the states where the lands lie, so that justice cannot be expected from the state tribunals."—Suppose it were proper indeed to provide for such case, why include all cases, and for all time to come? Demands as to land for 21 years would have satisfied this. A London merchant shall come to America, and sue for his supposed debt, and the citizen of this country shall be deprived of jury trial, and subjected to an appeal (tho' nothing but the *fact* is disputed) to a court 500 or 1000 miles from home; when if this American has a claim upon an inhabitant of England, his adversary is secured of the privilege of jury trial.—This jurisdiction goes also to controversies between any state and its citizens; which, though *probably* not intended, may hereafter be set up as a ground to divest the states, severally, of the trial of criminals; inasmuch as every charge of felony or misdemeanour, is a controversy between the state and a citizen of the same: that is to say, the state is plaintiff and the party accused is defendant in the prosecution. In all doubts about jurisprudence, as was observed before, the paramount courts of Congress will decide, and the judges of the state, being *sub graviore lege*, under the paramount law, must acquiesce.

Mr. *Wilson* says, that it would have been impracticable to have made a general rule for jury trial in the civil cases assigned to the federal judiciary, because of the want of uniformity in the mode of jury trial, as practised by the several states. This objection proves too much, and therefore amounts to nothing. If it precludes the mode of common law in civil cases, it certainly does in criminal. Yet in these we are told "the oppression of government is effectually barred by declaring that in all criminal cases *trial by jury* shall be preserved." Astonishing, that provision could not be made for a jury in civil controversies, of 12 men, whose verdict should be unanimous, *to be taken from the vicinage*; a precaution which is omitted as to trial of crimes, which may be any where in the state within which

*Article III, section 2.

they have been committed. So that an inhabitant of *Kentucky* may be tried for treason at *Richmond.*

The abolition of jury trial in civil cases, is the more considerable, as at length the courts of Congress will supersede the state courts, when such mode of trial will fall into disuse among the people of the United States.

The northern nations of the European continent, have all lost this invaluable privilege: *Sweden*, the last of them, by the artifices of the *aristocratic* senate, which depressed the king and reduced the house of commons to insignificance. But the nation a few years ago, preferring the absolute authority of a monarch to the *vexatious* domination of the *well-born* few, an end was suddenly put to their power.

"The policy of this right of juries, (says judge Blackstone) to decide upon *fact*, is founded on this: That if the power of judging were entirely trusted with the magistrates, or any select body of men, named by the executive authority, their decisions, in spite of their own natural integrity, would have a biass towards those of their own rank and dignity; for it is not to be expected, that the *few* should be attentive to the rights of the *many*. This therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens."

The attempt of governor [Cadwallader] *Colden*, of New-York, before the revolution to re-examine the *facts* and re-consider the *damages*, in the case of *Forsey* against *Cunningham*, produced about the year 1764, a flame of patriotic and successful opposition, that will not be easily forgotten.

To manage the various and extensive judicial authority, proposed to be vested in Congress, there will be one or more inferior courts immediately requisite in each state; and laws and regulations must be forthwith provided to direct the judges—here is a wide door for inconvenience to enter. Contracts made under the acts of the states respectively, will come before courts acting under new laws and new modes of proceeding, not thought of when they were entered into.—An inhabitant of Pennsylvania residing at Pittsburgh, finds the goods of his debtor, who resides in Virginia, within the reach of his attachment; but no writ can be had to authorise the marshal, sheriff, or other officer of Congress, to seize the property, about to be removed, nearer than 200 miles: suppose that at Carlisle, for instance, such a writ may be had, mean while the object escapes. Or if an inferior court, whose judges have ample salaries, be established in every county, would not the expence be enormous? Every reader can extend in his imagination, the instances of difficulty which would proceed from this needless interference with the judicial rights of the separate states, and which as much as any other circumstance in the

new plan, implies that the dissolution of their forms of government is designed.

AN OLD WHIG III
Philadelphia *Independent Gazetteer*, 20 October 1787 (excerpt)*

As to the trial by jury, the question may be decided in a few words. Any future Congress sitting under the authority of the proposed new constitution, may, if they chuse, enact that there shall be no more trial by jury, in any of the United States; except in the trial of crimes; and this "SUPREME LAW" will at once annul the trial by jury, in all other cases. The author of the speech† supposes that no danger "can possibly ensue, since the proceedings of the supreme court are to be regulated by the Congress, which is a faithful representation of the people; and the oppression of government is effectually barred; by declaring that in all criminal cases the trial by jury shall be preserved." Let us examine the last clause of this sentence first.—I know that an affected indifference to the trial by jury has been expressed, by some persons high in the confidence of the present ruling party in some of the states;—and yet for my own part I cannot change the opinion I had early formed of the excellence of this mode of trial even in civil causes. On the other hand I have no doubt that whenever a settled plan shall be formed for the extirpation of liberty, the banishment of jury trials will be one of the means adopted for the purpose.—But how is it that "the oppression of government is effectually barred by declaring that in all criminal cases the trial by jury shall be preserved?"—Are there not a thousand civil cases in which the government is a party?—In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution yet these are all of them civil causes.—These penalties, forfeitures and demands of public debts may be multiplied at the will and pleasure of government.—These modes of harrassing the subject have perhaps been more effectual than direct criminal prosecutions.—In the reign of Henry the Seventh of England, Empson and Dudley acquired an infamous immortality by these prosecutions for penalties and forfeitures:—Yet all these prosecutions were in the form of civil actions; they are undoubtedly objects highly alluring to a government.—They fill the public coffers and enable government to reward its minions at a cheap rate.—They are a profitable kind of revenge and gratify the officers about

*Reprinted: *New York Journal*, 1 December.
†A reference to James Wilson's 6 October speech.

a court, who study their own interests more than corporal punishment.—Perhaps they have at all times been more eagerly pursued than mere criminal prosecutions.—Shall trial by jury be taken away in all these cases and shall we still be told that "we are effectually secured against the oppressions of government?" At this rate Judges may sit in the United States, as they did in some instances before the war, without a jury to condemn people's property and extract money from their pockets, to be put into the pockets of the judges themselves who condemn them; and we shall be told that we are safe from the oppression of government.—No, Mr. Printer, we ought not to part with the trial by jury; we ought to guard this and many other privileges by a bill of rights, which cannot be invaded. The reason that is pretended in the speech why such a declaration; as a bill of rights requires, cannot be made for the protection of the trial by jury;—"that we cannot with any propriety say 'that the trial by jury shall be as heretofore' " in the case of a federal system of jurisprudence, is almost too contemptible to merit notice.—Is this the only form of words that language could afford on such an important occasion? Or if it were to what did these words refer when adopted in the constitutions of the states?—Plainly sir, to the trial by juries as established by the common law of England in the state of its purity;—That common law for which we contended so eagerly at the time of the revolution, and which now after the interval of a very few years, by the proposed new constitution we seem ready to abandon forever; at least in that article which is the most invaluable part of it; the trial by jury.

Dissent of the Minority of the Pennsylvania Convention (Samuel Bryan)
Pennsylvania Packet, 18 December 1787 (excerpt)*

We have before noticed the judicial power as it would effect a consolidation of the states into one government; we will now examine it, as it would affect the liberties and welfare of the people, supposing such a government were practicable and proper.

The judicial power, under the proposed constitution, is founded on the well-known principles of the *civil law*, by which the judge determines

*The Pennsylvania Convention ratified the Constitution on 12 December 1787 by a vote of 46–23. On 18 December this dissent was published in the *Pennsylvania Packet* and as a broadside. It was signed by twenty-one of the twenty-three dissenters. The Dissent was reprinted in thirteen newspapers by 14 March 1788: R.I. (2), N.Y. (3), Pa. (6), Va. (1), S.C. (1), and in the Philadelphia *American Museum*, a nationally circulated magazine. It was also published in an anthology and as pamphlets in Boston and Richmond.

both on law and fact, and appeals are allowed from the inferior tribunals to the superior, upon the whole question; so that *facts* as well as *law*, would be re-examined, and even new facts brought forward in the court of appeals; and to use the words of a very eminent Civilian—"The cause is many times another thing before the court of appeals, than what it was at the time of the first sentence."

That this mode of proceeding is the one which must be adopted under this constitution, is evident from the following circumstances:—1st. That the trial by jury, which is the grand characteristic of the common law, is secured by the constitution, only in criminal cases.—2d. That the appeal from both *law* and *fact* is expressly established, which is utterly inconsistent with the principles of the common law, and trials by jury. The only mode in which an appeal from law and fact can be established, is, by adopting the principles and practice of the civil law; unless the United States should be drawn into the absurdity of calling and swearing juries, merely for the purpose of contradicting their verdicts, which would render juries contemptible and worse than useless.—3d. That the courts to be established would decide on all cases *of law and equity*, which is a well known characteristic of the civil law, and these courts would have conusance [cognizance] not only of the laws of the United States and of treaties, and of cases affecting ambassadors, but of all cases of *admiralty and maritime jurisdiction*, which last are matters belonging exclusively to the civil law, in every nation in Christendom.

Not to enlarge upon the loss of the invaluable right of trial by an unbiassed jury, so dear to every friend of liberty, the monstrous expence and inconveniences of the mode of proceeding to be adopted, are such as will prove intolerable to the people of this country. The lengthy proceedings of the civil law courts in the chancery of England, and in the courts of Scotland and France, are such that few men of moderate fortune can endure the expence of; the poor man must therefore submit to the wealthy. Length of purse will too often prevail against right and justice. For instance, we are told by the learned judge *Blackstone*, that a question only on the property of an *ox*, of the value of *three* guineas, originating under the civil law proceedings in Scotland, after many interlocutory orders and sentences below, was carried at length from the court of sessions, the highest court in that part of Great Britain, by way of *appeal* to the house of lords, where the question of law and fact was finally determined. He adds, that no pique or spirit could in the court of king's bench or common pleas at Westminster, have given continuance to such a cause for a tenth part of the time, nor have cost a twentieth part of the expence. Yet the costs in the courts of king's bench and common pleas in England, are infinitely greater than those which the people of this country have

ever experienced. We abhor the idea of losing the transcendant privilege of trial by jury, with the loss of which, it is remarked by the same learned author, that in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that *trial by jury* and the liberty of the people went out together. At the same time we regret the intolerable delay, the enormous expences and infinite vexation to which the people of this country will be exposed from the voluminous proceedings of the courts of civil law, and especially from the appellate jurisdiction, by means of which a man may be drawn from the utmost boundaries of this extensive country to the seat of the supreme court of the nation to contend, perhaps with a wealthy and powerful adversary. The consequence of this establishment will be an absolute confirmation of the power of aristocratical influence in the courts of justice; for the common people will not be able to contend or struggle against it.

Trial by jury in criminal cases may also be excluded by declaring that the libeller for instance shall be liable to an action of debt for a specified sum; thus evading the common law prosecution by indictment and trial by jury. And the common course of proceeding against a ship for breach of revenue laws by information (which will be classed among civil causes) will at the civil law be within the resort of a court, where no jury intervenes. Besides, the benefit of jury trial, in cases of a criminal nature, which cannot be evaded, will be rendered of little value, by calling the accused to answer far from home; there being no provision that the trial be by a jury of the neighbourhood or country. Thus an inhabitant of Pittsburgh, on a charge of crime committed on the banks of the Ohio, may be obliged to defend himself at the side of the Delaware, and so *vice versa*. To conclude this head: we observe that the judges of the courts of Congress would not be independent, as they are not debarred from holding other offices, during the pleasure of the president and senate, and as they may derive their support in part from fees, alterable by the legislature.

632. Brutus XV
New York Journal, 20 March[1]

(Continued.)

I said in my last number,[2] that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe, the courts of law are put upon the most prudent establishment, they are on a very different footing.

The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union.–I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution. They consider themselves bound to decide according to the existing laws of the land, and never undertake to controul them by adjudging that they are inconsistent with the constitution–much less are they vested with the power of giv[ing] an *equitable* construction to the constitution.

The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to sit aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.

I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible. But I say, this system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering the judges independent; which, in the British constitution, means no more than that they hold their places during good behaviour, and have fixed salaries, they have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can

remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. Before I proceed to illustrate the truth of these assertions, I beg liberty to make one remark-Though in my opinion the judges ought to hold their offices during good behaviour, yet I think it is clear, that the reasons in favour of this establishment of the judges in England, do by no means apply to this country.

The great reason assigned, why the judges in Britain ought to be commissioned during good behaviour, is this, that they may be placed in a situation, not to be influenced by the crown, to give such decisions, as would tend to increase its powers and prerogatives. While the judges held their places at the will and pleasure of the king, on whom they depended not only for their offices, but also for their salaries, they were subject to every undue influence. If the crown wished to carry a favorite point, to accomplish which the aid of the courts of law was necessary, the pleasure of the king would be signified to the judges. And it required the spirit of a martyr, for the judges to determine contrary to the king's will.-They were absolutely dependent upon him both for their offices and livings. The king, holding his office during life, and transmitting it to his posterity as an inheritance, has much stronger inducements to increase the prerogatives of his office than those who hold their offices for stated periods, or even for life. Hence the English nation gained a great point, in favour of liberty. When they obtained the appointment of the judges, during good behaviour, they got from the crown a concession, which deprived it of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people. But these reasons do not apply to this country, we have no hereditary monarch; those who appoint the judges do not hold their offices for life, nor do they descend to their children. The same arguments, therefore, which will conclude in favor of the tenor of the judge's offices for good behaviour, lose a considerable part of their weight when applied to the state and condition of America. But much less can it be shewn, that the nature of our government requires that the courts should be placed beyond all account more independent, so much so as to be above controul.

I have said that the judges under this system will be *independent* in the strict sense of the word: To prove this I will shew-That there is no power above them that can controul their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.

lst. There is no power above them that can correct their errors or controul their decisions-The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in

error or on the merits.–In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

2d. They cannot be removed from office or suffer a dimunition of their salaries, for any error in judgement or want of capacity.

It is expressly declared by the constitution,–"That they shall at stated times receive a compensation for their services which shall not be diminished during their continuance in office."

The only clause in the constitution which provides for the removal of the judges from offices, is that which declares, that "the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors." By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors.–Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges commited the error from wicked and corrupt motives.

3d. The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper,[3] that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority which vested the legislature with their powers, vested the judicial with theirs–both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial.–The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set

aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgement of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme–and no law, explanatory of the constitution, will be binding on them.

From the preceding remarks, which have been made on the judicial powers proposed in this system, the policy of it may be fully developed.

I have, in the course of my observation on this constitution, affirmed and endeavored to shew, that it was calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national. In this opinion the opposers of the system have generally agreed–and this has been uniformly denied by its advocates in public. Some individuals, indeed, among them, will confess, that it has this tendency, and scruple not to say, it is what they wish; and I will venture to predict, without the spirit of prophecy, that if it is adopted without amendments, or some such precautions as will ensure amendments immediately after its adoption, that the same gentlemen who have employed their talents and abilities with such success to influence the public mind to adopt this plan, will employ the same to persuade the people, that it will be for their good to abolish the state governments as useless and burdensome.

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accomodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them. In the mean time all the art and address of those who wish for the change will be employed to make converts to their opinion. The people will be told, that their state officers, and state legislatures are a burden and expence without affording any solid advantage, for that all the laws passed by them, might be equally well made by the general legislature. If to those who will be interested in the change, be added, those who will be under their influence, and such who will submit to almost any change of government, which they can be persuaded to believe will ease them of taxes, it is easy to see, the party who will favor the abolition of the state governments would be far from being inconsiderable.–In this situation, the general legislature, might pass one law after another, extending the general and abridging the state jurisdic-

tions, and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution.–If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees.

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature. A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm.*

1. Reprinted: Boston *American Herald*, 14 April; Providence *United States Chronicle*, 24 April. "A.B." asked the editor of the *United States Chronicle* to reprint "Brutus" in his "impartial Paper" because it was "worthy the Perusal of every Freeman." For the authorship, circulation, and impact of "Brutus," see CC:178.

2. See "Brutus" XIV (CC:576, 598).

3. See "Brutus" XI, *New York Journal*, 31 January (CC:489).

Federalist

PUBLIUS: THE FEDERALIST 78 (ALEXANDER HAMILTON) 28 May 1788*

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed: The only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points therefore our observations shall be confined.

The manner of constituting it seems to embrace these several objects—1st. The mode of appointing the judges—2d. The tenure by which they are to hold their place—3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: This chiefly concerns their duration in office; the provisions for their support; and the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behaviour*, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

*Reprinted: New York *Independent Journal*, 14 June; *New York Packet*, 17, 20 June.

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Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislative not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power;[a] that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[b] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority;

[a]The celebrated Montesquieu speaking of them says, "of the three powers above mentioned, the JUDICIARY is next to nothing." Spirit of Laws, vol. I, page 186.

[b]Idem. page 181.

such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought of course to be prefered; or in other words, the constitution ought to be prefered to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the

people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done: Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be prefered to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration

will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies[c] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would on that account be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles

[c]Vide Protest of the minority of the convention of Pennsylvania, Martin's speech, &c.

to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead, universal distrust and distress.

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniencies necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature,

the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quiting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of their judicial offices in point of duration; and that so far from being blameable on this account, their plan would have been inexcuseably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS: THE FEDERALIST 80 (ALEXANDER HAMILTON)
28 May 1788*

To judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider in the first place what are its proper objects.

It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes. 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d. to all those which concern the execution of the provisions expressly contained in the articles of union; 3d. to all those in which the United States are a party; 4th. to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th. to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiassed.

The first point depends upon this obvious consideration that there ought always to be a constitutional method of giving efficacy to consti-

*Reprinted: New York *Independent Journal*, 21 June; *New York Packet*, 27 June, 1 July.

V, 2634). See *The Federalist* 79 (CC:760, at note 3) for the dissatisfaction that "Publius" had with this provision.

4. Montesquieu, *Spirit of Laws*, I, Book XI, chapter VI, 228.

5. *Ibid.*, 222. The entire passage reads: "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."

6. See the "Dissent of the Minority of the Pennsylvania Convention," *Pennsylvania Packet*, 18 December (CC:353, pp. 14, 15–16); and Luther Martin, *Genuine Information* II, Baltimore *Maryland Gazette*, 1 January (CC:401, especially pp. 205–6).

760. Publius: The Federalist 79
New York, 28 May

This essay, written by Alexander Hamilton, first appeared in Volume II of the book edition of *The Federalist*. It was reprinted as number 78 in the New York *Independent Journal*, 18 June, and as number 79 in the *New York Packet*, 24 June. It has been transcribed from pages 299–302 of the book edition.

For a general discussion of the authorship, circulation, and impact of *The Federalist*, see CC:201, 406, 639, and Editors' Note, 28 May.

A further View of the Judicial Department, in Relation to the Provisions for the Support and Responsibility of the Judges.

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here.[1] In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent*[a] salaries should be established for the judges; but the experiment has in some instances shewn that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States "shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office."

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluc-

tuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the president and of the judges. That of the former can neither be increased nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the president is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to the end of it. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.[2]

The want of a provision for removing the judges on account of inability, has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practised upon,

or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities, than advance the interests of justice, or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity without any formal or express provision, may be safely pronounced to be a virtual disqualification.

The constitution of New-York, to avoid investigations that must forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty.[3] I believe there are few at present, who do not disapprove of this provision. There is no station in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period, in men who survive it; and when in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigour, and how improbable it is that any considerable proportion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent, and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity, than is to be found in the imaginary danger of a superannuated bench.

(a) Vide Constitution of Massachusetts, Chap. 2. Sect. 1. Art. 13.[4]

1. See *The Federalist* 73, *New York Packet*, 21 March (CC:635, especially p. 447).
2. See Articles 32–33 of the New York constitution (Thorpe, V, 2635).
3. See CC:759, note 3 (above).
4. Chapter II, Article XIII of the Massachusetts constitution reads in part: "Permanent and honorable salaries shall also be established by law for the justices of the supreme judicial court" (Thorpe, III, 1903).

761. Publius: The Federalist 80
New York, 28 May

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27 June, 1 July. It has been transcribed from pages 303–10 of the book edition.

For a general discussion of the authorship, circulation, and impact of *The Federalist*, see CC:201, 406, 639, and Editors' Note, 28 May.

A further View of the Judicial Department, in Relation to the Extent of its Powers.

To judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider in the first place what are its proper objects.

It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes. 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d. to all those which concern the execution of the provisions expressly contained in the articles of union; 3d. to all those in which the United States are a party; 4th. to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th. to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiassed.

The first point depends upon this obvious consideration that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the states.

As to the second point, it is impossible by any argument or comment to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being co-

extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union than that which has been just examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany prior to the institution of the IMPERIAL CHAMBER by Maximilian, towards the close of the fifteenth century; and informs us at the same

time of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences between the members of the Germanic body.

A method of terminating territorial disputes between the states, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together.[1] But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the states. And though the proposed constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen, nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the states, are proper objects of federal superintendence and control.

It may be esteemed the basis of the union, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The fifth point will demand little animadversion. The most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.[2]

The reasonableness of the agency of the national courts in cases in

which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between the citizens of the same state. Claims to land under grants of different states, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. It is to comprehend, "all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens and subjects." This constitutes the entire mass of the judicial authority of the union. Let us now review it in detail. It is then to extend,

First. To all cases in law and equity *arising under the constitution* and *the laws of the United States*. This corresponds to the two first classes of causes which have been enumerated as proper for the jurisdiction of the United States. It has been asked what is meant by "cases arising under the constitution," in contradistinction from those "arising under the laws of the United States." The difference has been already explained. All the restrictions upon the authority of the state legislatures, furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising upon the constitution, and not upon the laws of the

United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity"? What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud, accident, trust* or *hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: These are contracts, in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law; yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable, as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different states, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those states where the formal and technical distinction between LAW and EQUITY is not maintained as in this state, where it is exemplified by every day's practice.

The judiciary authority of the union is to extend—

Second. To treaties made, or which shall be made under the authority of the United States, and to all cases affecting ambassadors, other public ministers and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form altogether the fifth of the enumerated classes of causes proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more states, between a state and citizens of another state, between citizens of different states. These belong to the fourth of those classes, and partake in some measure of the nature of the last.

Sixth. To cases between the citizens of the same state, *claiming lands under grants of different states.* These fall within the last class, and *are the only instance in which the proposed constitution directly contemplates the cognizance of disputes between the citizens of the same state.*

Seventh. To cases between a state and the citizens thereof, and foreign states, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes, and have been shewn to be in a peculiar manner the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniencies should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniencies. The possibility of particular mischiefs can never be viewed by a well-informed mind as a solid objection to a general principle, which is calculated to avoid general mischiefs, and to obtain general advantages.

1. Article IX of the Articles of Confederation provided that Congress was "the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever." It also outlined the procedures by which this authority was to be exercised. The primary means of settling disputes was the appointment (by the disputing states) of commissioners to a court that would hear and determine "the matter in question" (CDR, 89–90). In 1782 such a court confirmed Pennsylvania's jurisdiction over the Wyoming Valley in its dispute with Connecticut.

2. The Articles of Confederation gave Congress the authority to appoint admiralty courts to try cases of piracy and felonies committed on the high seas and to create an appellate court for cases of captures (CDR, 89). In January 1780, even before the Articles were adopted, Congress established the Court of Appeals in Cases of Capture, consisting of three judges, to hear appeals from the state admiralty courts. Trials in this court, presumably to determine questions of fact, were to "be according to the usage of nations and not by jury." In April 1781, after the Articles were adopted, Congress created courts for the trial of piracies and felonies committed on the high seas, which provided that "justices of the supreme or superior courts of judicature, and judge of the Court of Admiralty of the several and respective states, or any two or more of them, are hereby constituted and appointed judges for hearing and trying such offenders." Trials in these courts were to be by jury "according to the course of the common law" and "as by the laws of the said State is accustomed" (JCC, XVI, 61–64; XIX, 354–56).

762. Publius: The Federalist 81
New York, 28 May

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For a general discussion of the authorship, circulation, and impact of *The Federalist*, see CC:201, 406, 639, and Editors' Note, 28 May.

A further View of the Judicial Department, in Relation to the Distribution of its Authority.

Let us now return to the partition of the judiciary authority between different courts, and their relations to each other.

"The judicial power of the United States is (by the plan of the convention) to be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."[a]

That there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition.[1] The only question that seems to have been raised concerning it, is whether it ought to be a distinct body, or a branch of the legislature. The same contradiction is observable in regard to this matter, which has been remarked in several other cases. The very men who object to the senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes in the whole, or in a part of the legislative body.

The arguments or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed supreme court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws, according to the *spirit* of the constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the state constitutions in general. The parliament of Great-Britain, and the legislatures of the several states, can at any time rectify by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States will be uncontrolable and remediless."[2] This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them

any greater latitude in this respect, than may be claimed by the courts of every state. I admit however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not to all the state governments. There can be no objection therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the proposed supreme court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great-Britain and in that of this state. To insist upon this point, the authors of the objection must renounce the meaning they have laboured to annex to the celebrated maxim requiring a separation of the departments of power. It shall nevertheless be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule; yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit, which had operated in making them, would be too apt to operate in interpreting them: Still less could it be expected, that men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach, in the character of judges. Nor is this all:—Every reason, which recommends the tenure of good behaviour for judicial offices, militates against placing the judiciary power in the last resort in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes in the first instance to judges of permanent standing, and in the last to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men, who for want of the same advantage cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those

qualifications which fit men for the stations of judges; and as on this account there will be great reason to apprehend all the ill consequences of defective information; so on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those states, who have committed the judicial power in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those, who have represented the plan of the convention in this respect as novel and unprecedented, it is but a copy of the constitutions of New-Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia; and the preference which has been given to these models is highly to be commended.

It is not true, in the second place, that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act. Nor is there any thing in the proposed constitution more than in either of them, by which it is forbidden. In the former as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the state governments, as to the national government, now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force.

And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments.

Having now examined, and I trust removed the objections to the distinct and independent organization of the supreme court, I proceed to consider the propriety of the power of constituting inferior courts,[b] and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the supreme court, in every case of federal cognizance. It is intended to enable the national government to institute or *authorise* in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude; yet the substance of the power in question, may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national constitution. To confer the power of determining such causes upon the existing courts of the several states, would perhaps be as much "to constitute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favour of the state courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original

cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or diffidence of the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction in the several classes of causes to which it is extended by the plan of the convention, I should consider every thing calculated to give in practice, an *unrestrained course* to appeals as a source of public and private inconvenience.

I am not sure but that it will be found highly expedient and useful to divide the United States into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state. The judges of these courts, with the aid of the state judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch; and appeals may be safely circumscribed within a very narrow compass. This plan appears to me at present the most eligible of any that could be adopted, and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the union.

The supreme court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers and consuls, and those in which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in

the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here.[5] A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorise suits against states, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations; we have seen that the original jurisdiction of the supreme court would be confined to two classes of causes, and those of a nature rarely to occur. In all other causes of federal cognizance, the original jurisdiction would appertain to the inferior tribunals, and the supreme court would have nothing more than an appellate jurisdiction, "with such *exceptions*, and under such *regulations* as the congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamours have been loud against it as applied to matters of fact. Some well intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favour of the civil law mode of trial, which prevails in our courts of admirality, probates and chancery. A technical sense has been affixed to the term "appellate", which in our law parlance is commonly used in reference to appeals in the

course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New-England. There an appeal from one jury to another is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word "appellate" therefore will not be understood in the same sense in New-England as in New-York, which shews the impropriety of a technical interpretation derived from the jurisprudence of any particular state. The expression taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision, (in a new government it must depend on the latter) and may be with or without the aid of a jury, as may be judged adviseable. If therefore the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the supreme court.

But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the supreme court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this state, that the latter has jurisdiction of the fact, as well as the law? It is true it cannot institute a new enquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.[c] This is jurisdiction of both fact and law, nor is it even possible to separate them. Though the common law courts of this state ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly, when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend therefore on this ground, that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention in relation to this particular provision. The appellate jurisdiction of the supreme court (may it have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, and others in the course of the CIVIL LAW. In the former, the revision of the law only, will be, generally speaking, the proper province of the supreme court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes

are an example, might be essential to the preservation of the public peace. It is therefore necessary, that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases, which shall have been originally tried by a jury, because in the courts of some of the states, *all causes* are tried in this mode;(d) and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniencies, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the supreme court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorised exception; but if for the reason already intimated it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this—that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature, that in the partition of this authority a very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals—that the supreme court will possess an appellate jurisdiction both as to law and fact in all the cases refered to them, but subject to any *exceptions* and *regulations* which may be thought adviseable; that this appellate jurisdiction does in no case *abolish* the trial by jury, and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniencies which have been predicted from that source.

(a) Article 3. Sec. 1.

(b) This power has been absurdly represented as intended to abolish all the county courts in the several states, which

are commonly called inferior courts. But the expressions of the constitution are to constitute "tribunals INFERIOR TO THE SUPREME COURT," and the evident design of the provision is to enable the institution of local courts subordinate to the supreme, either in states or larger districts. It is ridiculous to imagine that county courts were in contemplation.

(c) This word is a compound of JUS and DICTIO, juris, dictio, or a speaking or pronouncing of the law.

(d) I hold that the states will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

1. See *The Federalist* 22, *New York Packet*, 14 December (CC:347, especially p. 442).

2. Some of these arguments are found in "Brutus" XV, *New York Journal*, 20 March (CC:632, especially pp. 431–35). This essay was the last of several that "Brutus" published between 31 January and 20 March criticizing the vast power of the federal judiciary (CC:489, 510, 530, 551, 576, 598).

3. See *The Federalist* 32–33, New York *Independent Journal*, 2 January (CC:405, pp. 217–19).

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New York, 28 May

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A further View of the Judicial Department, in reference to some miscellaneous Questions.

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.

Such questions accordingly have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the state courts in regard to those causes, which are to be submitted to federal jurisdiction. Is

HAYBURN'S CASE.

SUPREME COURT OF THE UNITED STATES

2 U.S. 409; 1792 U.S. LEXIS 591; 1 L. Ed. 436; 2 Dall. 409

AUGUST 1792, Term

PRIOR HISTORY: [**1]

HIS was a motion for a mandamus to be directed to the Circuit Court for the district of Pennsylvania, commanding the said court to proceed in a certain petition of Wm. Hayburn, who had applied to be put on the pension list of the United States, as an invalid petitioner.

The principal case arose upon the act of Congress passed the 23d of March, 1792.

The Attorney General (Randolph) who made the motion for the mandamus, having premised that it was done ex officio, without an application from any particular person, but with a view to procure the execution of an act of Congress, particularly interesting to a meritorious and unfortunate class of citizens, THE COURT declared that they entertained great doubt upon his right, under such circumstances, and in a case of this kind, to proceed ex officio; and directed him to state the principles on which he attempted to support the right. The Attorney General, accordingly, entered into an elaborate description of the powers and duties of his office: --

OPINION: [*409] But THE COURT being divided in opinion on that question, the motion, made ex officio was not allowed.

The Attorney General then changed the ground on his interposition, [**2] declaring it to be at the instance, and on behalf of Hayburn, a party interested; and he entered into the merits of the case, upon the act of Congress, and the refusal of the Judges to carry it into effect.

THE COURT observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the Legislature, at an an intermediate [*410] session; provided, in another way, for the relief of the pensioners. n2 [***437]

n2 See an act passed the 28th Feb. 1793. -- As the reasons assigned by the Judges, for declining to execute the first act of Congress, involve a great Constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.

The Circuit court for the district of New-York (consisting of JAY, Chief

Justice, CUSHING, Justice, and DUANE, District Judge) proceeded on the 5th of April, 1791, to take into consideration the act of Congress entitled "An act to provide for settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regular the claims to invalid pensions;" and were, thereupon, unanimously, of opinion and agreed.

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit courts, by this act, are not of that description; and that the act itself does not appear to contemplate them as such; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the Secretary of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to fit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the acts can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal descriptions.

"That the Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office.

"That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the Judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the National Legislature, they will execute this act in the capacity of commissioners.

"That as the Legislature have a right to extend that session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed.

"That the Judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed as commissioners to execute the business of this act in the same court room, or chamber."

The Circuit court for the district of Pennsylvania, (consisting of WILSON,

and BLAIR, Justices, and PETERS, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to "take care that the laws" of the United States "be faithfully executed." Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the union.

"The people of the United States have vested in Congress all legislative powers "granted in the constitution."

"They have vested in one Supreme court, and in such inferior courts as the Congress shall establish, "the judicial power of the United States."

It is worthy of remark, that in Congress, the whole legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they "ordained and established the Constitution."

"This Constitution is "the Supreme Law of the Land." This supreme law "all judicial officers of the United States are bound, by oath or affirmation, or support."

"It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"They have placed their judicial power not in Congress, but in "courts." They have ordained that the "Judges of those courts shall hold their offices during good behavior," and that "during their continuance in office, their salaries shall not be diminished."

"Congress have lately passed an act, to regulate, among other things, "the claims to invalid persons."

"Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit court held for the Pennsylvania district could not proceed;

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.

"2d. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in

the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.

"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again."

The Circuit court for the district of North Carolina, (consisting of IREDELL, Justice, and SITGREAVES, District Judge) made the following representations in a letter jointly addressed to the President of the United States, on the 8th of June, 1792.

"We, the judges now attending at the Circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of Congress lately passed, entitled "an act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions.

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficult we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"The extreme importance of the case, and our desire of being explicit beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, Sir, submit to you the following: --

"1. That the legislative, Executive, and Judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.

"2. That the Legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty

they may think proper to require, the Judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"3.That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating Judicial power, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another art) any power not in its nature judicial, or, if judicial, nor provided for upon the terms of the Constitution requires.

"4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be least suspended in its operation by the Secretary at War, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution; for, though Congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behaviour, by which tenure the office of Secretary of War is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

"These, sir, are our reasons for being of opinion, as we are at present, that this Circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether in our opinion such purpose can or cannot be answered, it is, as we conceive, our indispensable duty to keep open any court of which we have the honor to be judges, as long as Congress shall direct.

"The high respect we entertain for the Legislature, our feelings as men for persons, whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service.But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the Judges of it; and as the

Secretary at War has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, to with-hold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude ourselves from a very deliberate consideration, whether we can be warranted in executing the purposes of the acts in the manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore we have had some doubts to the propriety of giving an opinion in a case which was not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly; much more deliberately, given: But in the present instance, as many unfortunate and meritorious individuals, whom Congress have justly thought proper objects of immediate relief, may suffer great distress even by a short delay, and may be utterly ruined by a long one, we determined at all events to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving however, that so far as we are concerned individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly, being as far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable, as we should be from so low a sense of duty, as to think it would not be the highest and most deserved reproach that could be bestowed on any men (much more on Judges) that they were capable, from any motive, of persevering against conviction, in apparently maintaining as opinion, which they really thought to be erroneous." [**3]

[*411] RULE.

THE Attorney General having moved for information, relative to the system of practice by which the Attornies and Counsellors of this court shall regulate themselves, and of [*412] the place in which rules in causes here depending shall be obtained, THE CHIEF JUSTICE, a subsequent day, stated, that

[*413] THE COURT considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the [*414] practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.

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Marbury v. Madison
Opinion
U.S. Supreme Court, 24 February 1803

EDITORIAL NOTE

The opinion given by Chief Justice Marshall in *Marbury* v. *Madison* enjoys the status of a landmark, perhaps the most prominent, of American constitutional law. In deciding this case, the Supreme Court for the first time declared an act of Congress void as contrary to the Constitution. *Marbury* hence became the leading precedent for "judicial review," the court's power to pass upon the constitutionality of legislative acts.

Marshall considered this case to be among the most important decided during his tenure as chief justice, though perhaps not for the same reasons that later generations so regarded it. The only part of his opinion that is read and remembered today is the concluding and comparatively brief section setting forth the doctrine of judicial review. To Marshall, the court's power to pronounce a law unconstitutional was not the only point he undertook to decide and probably not the most important. In his mind the preceding discussion of the other points—what critics then and later dismissed as "dicta"—constituted the real heart of the opinion.

The case began at the December 1801 term of the Supreme Court. Charles Lee moved for a rule to Secretary of State James Madison to show cause why a mandamus should not issue commanding him to deliver the commissions of William Marbury, Robert T. Hooe, and Dennis Ramsay as justices of the peace for the District of Columbia. Marbury and his co-complainants were among a total of forty-two persons who had been nominated justices of the peace by departing President Adams on 2 March 1801. After the Senate confirmed these appointments the same day, Adams on 3 March, his last day in office, signed the commissions and transmitted them to Secretary of State Marshall to affix the seal and send out. Neither on that day nor on 4 March, when Marshall (at President Jefferson's request) continued to act as secretary of state, were the commissions dispatched. Assuming that he had discretion to revoke these appointments because the commissions had not been delivered, President Jefferson on 5 March made appointments of his own (later confirmed by the Senate), reducing the number of justices to thirty. Although Jefferson reappointed many who had been nominated by his predecessor, Marbury, Hooe, and Ramsay were not among them.[1]

Lee presented his motion to the Supreme Court on 17 December, supported by the applicants' affidavits setting forth their unsuccessful attempts to obtain their commissions or any information relating to their appointments from the secretary of state's office. The chief justice on 18 December announced the decision of the court to grant the rule, assigning the fourth day of the next term for hearing arguments on the question whether a mandamus should issue for delivery of the commissions.[2] The next term, as provided by the Judiciary Act of 1801, was scheduled for June 1802. In the meantime, however, Congress repealed that act and abolished the June term, which meant that Marbury's case was postponed until February 1803.

The hearing began on 10 February, with Chief Justice Marshall and Associate Justices Paterson, Chase, and Washington in attendance. As counsel for Marbury and others, Lee first tried to show that his clients had been nominated and confirmed as justices of the peace and that their commissions had been signed, sealed, and recorded. Unable to obtain voluntary affidavits and rebuffed in his efforts to obtain from the Senate a certified record of the confirmation of the appointments, Lee summoned Jacob Wagner and Daniel Brent, clerks in the State Department, to give their testimony. Ordered by the court to be sworn, these reluctant witnesses accordingly testified. Another reluctant witness, Attorney General Levi Lincoln (who had served as acting secretary of state until James Madison assumed office in May 1801), was permitted to postpone testifying until the next day. The first part of 11 February was devoted to Lincoln's testimony and to the reading of the affidavit of James M. Marshall, brother of the chief justice and himself an assistant judge of the U.S. Circuit Court for the District of Columbia. Satisfied that this evidence was sufficient to prove the existence of the commissions, Lee then launched a long argument in support of issuing a mandamus. The cause was not argued on the other side, Lincoln stating that he was not instructed. The court asked for the observations of anyone who was disposed to offer any, but there was no reply.[3]

Nearly two weeks elapsed before the court rendered its decision, an indication of the difficulty of the case, though the delay can be attributed in part to Samuel Chase's ill health. To accommodate the indisposed Chase, the court on 16 February adjourned from the Capitol to nearby Stelle's Hotel, where it presumably continued to sit for the remainder of the term. William Cushing, the ailing senior associate justice, did not attend the 1803 term. Alfred Moore arrived on 18 February, after the argument but six days before the opinion. If he abstained from the deliberations, then there was a bare quorum of four justices who sat in the cause: Marshall, Paterson, Chase, and Washington.[4]

A singular circumstance of this case is that the chief justice himself, as President Adams's secretary of state, was the official responsible for sending out the commissions of Marbury and the other appointees. Would the application for a mandamus never have occurred but for Marshall's inattention to this duty? Writing to his brother two weeks after Jefferson's inauguration, Marshall explained his conduct: "I did not send out the commissions because I apprehended such as were for a fixd time to be completed when signd & seald & such as depended on the will of the President might at any time be revokd. To withhold the commission of the Marshal is equal to displacing him which the President I presume has the power to do, but to withhold the commission of the Justices is an act of which I entertaind no suspicion."[5] At the time, then, Marshall believed the process of commissioning justices of the peace was complete without actual delivery, a position he was to maintain two years later in the opinion. Whatever the merits of his position on this technical point, Marshall's not delivering the commissions provided President Jefferson the opportunity to withhold them.

From the beginning, Marbury's application to the Supreme Court for a mandamus was more than a private "legal" dispute. It arose directly from the victorious party's resentment at the outgoing administration's eleventh-hour

appointments to a host of new judicial offices created by the Judiciary Act of 1801 and the act concerning the District of Columbia. The lame-duck Federalist Congress had enacted both laws during the waning days of Adams's presidency. The very bringing of the action, which coincided with the meeting of the first session of the new Congress under a Republican majority, hastened the repeal of the judiciary act and prompted the accompanying act by which the Supreme Court lost a term and did not meet again for another fourteen months.

Marbury can scarcely be understood without firmly anchoring it to the political context of Thomas Jefferson's first administration. The opinion delivered by the chief justice, whether denounced by Republicans or hailed by Federalists, was interpreted by contemporaries almost exclusively in partisan terms. Even today, critics find fault with Marshall for using the case to lecture the president, while admirers praise him for striking a blow for judicial independence in the face of a determined assault on the federal judiciary by the Jeffersonian political majority. Yet to read the opinion solely in the light of the raging party battles of the day, or to read it only as a "landmark" that established the doctrine of judicial review, is to miss the full significance of the case.

The only documentary evidence of the justices' motives in deciding the case in the manner they did is the opinion itself. A reading of the whole opinion on its own terms leaves little doubt that the court intended the mandamus case to be the occasion of a major statement of the judiciary's role in the American constitutional system. In this regard, however, the court was less concerned to assert its power to review acts of Congress than to discover and apply a principle for bringing executive acts under judicial scrutiny. The latter constituted the "peculiar delicacy" and "real difficulty" of the case according to Marshall. More than half the opinion is devoted to an inquiry into the nature of executive acts, which were found to fall into two categories: "political," or discretionary, which were not examinable by courts; and "ministerial," where the law imposes a duty on an officer to perform a certain act on which individual rights depend. Acts of this class were properly reviewable by courts in the course of enforcing legal rights.

Marshall anticipated that even this limited claim would be "considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogative of the executive." If the court's disclaiming "all pretensions to such a jurisdiction" failed to mute criticism of the opinion, still there is no reason to doubt the sincerity of the declaration. Given the peculiar circumstances of the case, the unavoidable connection between Marbury's claim to his commission and the political defeat of the Federalists, the court faced a formidable task of writing an opinion that breathed disinterested judicial statesmanship. There was an inherent difficulty in assimilating this highly political case to the realm of legal rights and remedies and in making it the occasion for denying jurisdiction in political questions.

The first part of the opinion affirmed that Marbury had a legal right and remedy. Since it ultimately denied that it had jurisdiction to issue the mandamus, the court was denounced for improperly deciding the merits of the case

before taking up the question of jurisdiction. In a broader sense, however, the entire opinion centered on the single issue of jurisdiction. Before deciding whether a mandamus could issue in this particular case, the court logically had to consider the more general question whether there were any cases in which a high officer of the executive department could be made answerable in court for his conduct. Indeed, the chief justice and his associates could hardly avoid the question, for it had been argued at great length by Charles Lee. They might have concluded at once that the secretary of state could not be brought into court under any circumstances, thereby obviating judicial review or statutory construction as a means of deciding upon Marbury's claim.

The ground for denying the mandamus was that section 13 of the Judiciary Act of 1789, which empowered the Supreme Court to issue that writ, was an unconstitutional enlargement of the court's original jurisdiction. No part of the opinion has provoked more commentary by legal scholars than this holding. The chief justice, it is pointed out, could have denied the motion for a mandamus without concluding that section 13 was unconstitutional; alternatively, he could have supported the motion by a less literal reading of the judiciary article of the Constitution.[6] Why did the court resort to judicial review, seemingly going out of its way to contrive a constitutional conflict? And why, after stating in such emphatic language that Marbury had a legal right and that mandamus was the appropriate remedy, did the court then deny itself the authority to issue the writ? Such a narrow construction of the Constitution seemed to be directly at odds with the court's interpretation and practice in earlier mandamus cases.

Scholars attribute the motives behind the decision in *Marbury* largely to the political circumstances attending the case—circumstances that compelled Marshall to eschew sounder legal arguments in favor of judicial finesse. The chief justice, it is explained, wanted to declare the authority of the court to bring certain acts of the executive under judicial cognizance and to draw a line that would separate "political" from "legal" questions. Given the vulnerable situation of the federal judiciary, however, he had to avoid the direct confrontation with the administration that would have occurred if the court granted Marbury's motion. Unable to strike a direct blow against the executive, Marshall recognized an opportunity to stake out the court's jurisdiction over legislative as well as executive acts. By declaring section 13 unconstitutional, he adroitly coupled judicial review of an act of Congress with the denial of the mandamus. In *Marbury* the court thus accomplished what it could not have done in *Stuart* v. *Laird* (also decided at the February 1803 term), a case that brought into issue the constitutionality of the repeal of the Judiciary Act of 1801. For all his doubts about the legitimacy of the repeal, the chief justice understood that the court had no choice but to bow to the will of Congress in that case.[7]

Seen in this light, the *Marbury* opinion has been acclaimed as a brilliant political coup, at once bold and cautious, a masterpiece of judicial statesmanship in which the court yielded the immediate point while gaining its more important long-range aims. The dubious legal and constitutional arguments,

the seemingly willful disregard of past practice and precedents, pale into insignificance when viewed against the larger purposes accomplished by the chief justice.

Why the court decided the case as it did and how Marshall was able to secure the apparent unanimity of the justices are questions to which there can be no certain answer, only reasoned conjecture. For all its persuasiveness, the "political" explanation rests on the assumption that the opinion cannot be read at face value. The justices, so it is assumed, did not really believe that section 13 was unconstitutional; nor did they seriously consider awarding the mandamus, knowing they were powerless to compel obedience to the court's command.

In retrospect, *Marbury* does have the appearance of an ingeniously conceived and executed act of judicial politics, the handiwork largely of John Marshall. Yet hindsight may obscure what to the chief justice and his brethren was a tentative, makeshift, and unsatisfactory resolution of the case. Was the author of the opinion as subtle, calculating, and foresighted as has been commonly assumed? Did he have it in mind, as part of a preconcerted agenda, to establish a precedent for judicial review, selecting this case as the opportune moment to strike? The perfunctory, almost matter-of-fact, exposition of judicial review was perhaps a clever tactic to win acceptance of a highly controversial doctrine. On the other hand, this language may have been nothing more than a straightforward expression of Marshall's belief that judicial review was a settled question, that the court was not boldly asserting a claim to a new power but merely restating a power it already possessed. In that case there would be no reason to contrive a case to exercise judicial review.

Perhaps, after all, Marshall genuinely believed that section 13 was unconstitutional—a view that, as indicated by the absence of any criticism of this part of the opinion in the contemporary commentary on the case, was not novel or eccentric. On this supposition, his stated reason for refusing the mandamus was the real one, not just a pretext to disguise his unwillingness to provoke a direct clash with the executive. And if the first part of the opinion was not idle rhetoric, if it is taken to mean what it expressly stated, then the chief justice was prepared to risk the consequences of ordering the secretary of state to deliver Marbury's commission.

No manuscript of the opinion survives. The text below is taken from the *Washington Federalist*, the first newspaper to print the opinion in full, on 14 and 16 March. Although many newspapers printed the opinion, the fullest coverage was provided by the *National Intelligencer*, which published the entire report of the case (including the preliminary proceedings and the argument of Charles Lee) in its issues of 18, 21, and 25 March 1803. The newspapers obtained copies of the report and opinion from the reporter William Cranch, whose first volume of reports (containing the *Marbury* opinion) was published in July 1804. The original case file of *Marbury* v. *Madison*, partly destroyed by fire, contains the affidavits of Marbury and the other plaintiffs and the testimony of the witnesses.[8]

1. Haskins and Johnson, *Foundations of Power*, 183–84.
2. U.S. Sup. Ct. Minutes, 18 Dec. 1801; *National Intelligencer*, 21 Dec. 1801.
3. Marbury v. Madison, 1 Cranch 137–53; U.S. Sup. Ct. Minutes, 10, 11 Feb. 1803. Newspaper accounts provide additional details. See *National Intelligencer*, 14 Feb. 1803; Philadelphia *Aurora*, 15 Feb., 22 Feb. 1803.
4. U.S. Sup. Ct. Minutes, 15, 16, 18, 24 Feb. 1803.
5. JM to James M. Marshall, 18 Mar. 1801.
6. See, for example, Haskins and Johnson, *Foundations of Power*, 199–201; David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* (Chicago, 1985), 67–69.
7. R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (New York, 1968), 29–32; Donald O. Dewey, *Marshall Versus Jefferson: The Political Background of Marbury v. Madison* (New York, 1970), 99–100, 129–33; Haskins and Johnson, *Foundations of Power*, 201–4; Susan Low Bloch and Maeva Marcus, "John Marshall's Selective Use of History in *Marbury v. Madison*," *Wisconsin Law Review* (1986), 333–37.
8. Marbury v. Madison, Orig. Case Files, Feb. 1803 term.

OPINION

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to shew cause why a Mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of peace for the County of Washington, in the district of Columbia.

No cause has been shewn, and the present motion is for a Mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.[1]

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *Mandamus* issuing from this court?

The first object of enquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace,

of which an individual had a vested interest; but that a mandamus ought not to issue *in that case*; the decision necessarily to be made if the report of the commissioners did not confer, on the applicant a legal right.[14]

The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.[15]

The doctrine, therefore, now advanced is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has to that commission a vested, legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removeable at the will of the executive; and being so appointed, he has a right to the commission which the Secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person intitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.[16]

This then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorises the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the U. States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorised to issue a writ of mandamus to such an officer, it must be, because the law is unconstitu-

tional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme court, ⟨and in⟩ such inferior courts as congress shall, from ⟨time⟩ to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States: and consequently in some form may be exercised over the present case: because the right claimed is given by a law of the United States.

In the distribution of this power it is declared, that "The supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers & consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.[17]

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the Supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplussage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original—and original jurisdiction where the constitution has declared it shall be appellate—the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them—yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress

had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one Supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction—the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, & for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true—yet the jurisdiction must be appellate—not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers appears not to be warranted by the constitution—and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce

to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.

To what purpose are powers limited & to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, & like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law—if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly all those who have framed written constitutions, contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of the subject.

If an act of the legislature repugnant to the constitution, is void, does it not withstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to

overthrow in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound, and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules, governs the case. This is of the essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature—the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of Cotton, of Tobacco, or of Flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares, that "no bill of attainder or ex post facto law shall be passed."

If however such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, shall be convicted of treason, "unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed specially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature is completely demonstrative of the legislative opinion on this subject.

It is in these words, "I do solemnly swear that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding agreeably to *the constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?

recovered) or for its detention. Although the court in such an action might award the plaintiff his commission, such judgment would only place him in the same situation as before.

17. JM's summary is more detailed than the actual report of Lee's remarks on this point. "Congress," said Lee, "is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution" (1 Cranch 148). Lee cited as authority the case of U.S. v. Ravara, decided in the U.S. Circuit Court, Pennsylvania, in 1793. Speaking for the court, Judge Wilson held that although the Constitution vests in the Supreme Court original jurisdiction in cases affecting consuls, it did not preclude Congress from vesting concurrent jurisdiction in inferior courts. Judge Iredell, dissenting, insisted that the Constitution intended to invest exclusive jurisdiction in the Supreme Court in such cases (2 Dall. 297, 298).

To Oliver Wolcott, Jr.

My dear Sir Washington March 2d. 1803

On my return from a long tour into the country last fall I had the pleasure of finding your treatise on the report of the investigating committee of the last session of Congress.[1]

Receive my thanks for this valuable work which is renderd to me the more valuable by the proof its being transmitted by the author gives of my being yet in his recollection.

I always considerd the report, both for the matter it contains & the manner in which it was usherd to the world as among the most disreputable acts of the present administration. If I had ever entertaind any doubts on this subject your pamphlet woud have removd them.

"We have fallen upon evil times" & I do not clearly perceive a prospect of better.

It will always give me real pleasure to hear of your happiness & I beg you to beleive that with much truth & sincere esteem, I am your

J MARSHALL

ALS, Oliver Wolcott, Jr., Papers, CtHi.

1. The reference is to Wolcott's *An Address to the People of the United States* (Boston, 1802; S #3576). The former secretary of the treasury's pamphlet was a response to the report of *The Committee Appointed to Examine and Report Whether Monies, Drawn from the Treasury, Have Been Faithfully Applied to the Objects for Which They Were Appropriated . . .* ([Washington, D.C.], 1802; S #3397). This report, dated 29 Apr. 1802, was widely published in the newspapers and is reprinted in *ASP, Finance*, I, 752-821.

THE IMPEACHMENT OF SAMUEL CHASE

March 1804–March 1805

BACKGROUND

Thomas Jefferson: On President John Adams's Midnight Appointments

Thomas Jefferson to Abigail Adams, 13 June 1804

"I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment's displeasure. I did consider his last appointment to office as personally unkind. They were from among my most ardent political enemies, from whom no faithful cooperation could ever be expected, and laid me under the embarrassment of acting thro' men whose views were to defeat mine; or to encounter the odium of putting others in their places. It seemed but common justice to leave a successor free to act by instruments of his own Choice."

Representative William Branch Giles to Thomas Jefferson, 1 June 1801

"What concerns us most is the situation of the Judiciary as now organized. It is constantly asserted that the Revolution [of 1800] is incomplete, as long as that strong fortress is in possession of the enemy; and it is surely a most singular circumstance that the public sentiment should have forced itself into the Legislative and Executive Department, and that the Judiciary should not only not acknowledge its influence, but should pride itself in resisting its will, under the misapplied idea of 'independence.' . . . No remedy is competent to redress the evil system, but an absolute repeal of the whole Judiciary and terminating the present offices and creating a new system, defining the common law doctrine and restraining to the proper Constitutional extent the jurisdiction of the Courts."

President Jefferson Address to Congress, December 1801

"The judiciary system . . . and especially that portion of it recently erected will of course present itself to the contemplation of Congress."

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Samuel Chase to John Marshall, 24 April 1802

[On the repeal of the Judiciary Act of 1801 and the elimination of sixteen new circuit courts, and with them the appointments of the judges for those courts.] "The distinction of taking the Office from the Judge, and not the Judge from the Office, I consider as puerile, and nonsensical."

President Jefferson to John Dickinson, 18 December 1803

Federalists "have retired into the Judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased."

John Pickering Impeachment

U.S. *v.* Eliza: Ships *Eliza* seized by federal agents for revenue law violations. Appealed to federal district court. Owner and attorney were Federalists; arresting officer and district attorney were Republicans. Pickering found for the claimant, and when the district attorney pointed out that the judge had not yet heard the witnesses for the government side, Pickering ranted, raved and shout profanities stating "You may bring forty thousand & they will not alter the decree."

Insane and an alcoholic, Pickering was impeached by the House of Representatives and convicted by the Senate.

BACKGROUND FOR SAMUEL CHASE

Chase became a leader for independence. He helped write a conservative state constitution which he would have preferred to have been even more conservative. He opposed democracy. In the 1780s he led the more democratic party in Maryland and strongly opposed the ratification of the U.S. Constitution. But after ratification, he became an ardent Federalist.

Chase was described as aggressive, impulsive, tenacious, extravagant and careless in financial matters, loyal, rough hewn, crude, lack of social polish, love of classical

studies, religious commitment. His grandfather was a prosperous bricklayer and freeman of London. His father Thomas had a degree in physic (medicine) but abandoned medicine for the ministry as an Anglican minister. Thomas Chase emigrated to Maryland in 1739. Samuel Chase's mother died in childbirth with him.

Alexander Contee Hanson: Description of Chase

"I am constrained by candour to declare, that vile as Chase has been held by most of the better kind of his fellow Citizens, he has been the mover of almost every thing, this State has to boast of. Strange inconsistent man! Without him, how very seldom would any thing good have passed the Legislature, and yet could he *always* have prevailed, how soon would he have defeated every thing good which has been done! . . . I have viewed him with admiration and with horror, with kindness and with detestation. In the main I always liked tho' never would I trust him for more than a single turn."

Mayor and Alderman of Annapolis: Denounce Chase during Revolutionary movement:

Chase was a "busy, restless incendiary, a Ringleader of Mobs — a foul-mouth'd and inflaming son of Discord and Faction — a common Disturber of the public Tranquility, and a Promoter of the lawless excesses of the multitude."

Chase rode 150 in two days with Maryland's new instructions to vote for independence, arriving one day before the decisive vote. He voted for independence, signs the Declaration, was one of the most active members of Congress, and steadily opposed all intrigues aimed against George Washington. From 1778 to 1783 Chase was under a cloud because, using information available to him as a member of Congress, he cornered the flour market in Maryland as the French fleet arrived. Scandalized. Hamilton published a series of articles against Chase as a war profiteer. In January 1782, the Maryland House of Delegates voted to remove all charges against him.

After the war, Chase returned to practice the law, entered into commerce, and

speculated in coal and iron lands. In 1787 he admitted that he was bankrupt and asked the legislature's support, which was given. He strongly opposes adoption of the U.S. Constitution.

In 1788 he moved to Baltimore and was appointed judge of the state's criminal court. He resigned in 1790. In 1791 Chase assumed positions as chief judge of the Baltimore County criminal court and chief judge of Maryland's General Court. A majority (although not the 2/3s necessary) of the Assembly voted for his impeachment as violating the state constitution by holding two judicial appointments.

SAMUEL CHASE AS ASSOCIATE JUSTICE

Chase applied for an associate justice position in 1789 but was not nominated by Washington. John Rutledge was appointed Chief Justice to fill the vacancy left by the resignation of Chief Justice John Jay. Rutledge was, however, insane. "It is said openly that he is in an unhappy *state of mind* — & often deranged — by gentlemen immediately from his own country." (William Vans Murray to James McHenry, 24 December 1795)

James McHenry to George Washington, 14 June 1795

It is, Sir, after having weighed all these circumstances since our conversation respecting him; after having reflected upon the good that he has done, and the good that he may still do; after having debated within myself whether his political or other errors (which exist no longer) have been of such a cast and magnitude as to be a perpetual bar to his holding any office under the United States; after having considered the impressions which an appearance of neglect is apt to produce in minds constructed like his, that I have thought it a duty to mention him as a subject of consideration for present or future attention.

I need not tell you that to his professional knowledge he subjoins a very valuable stock of political science and information; but it may be proper to observe that he has discharged the office which he fills without the shadow of imputation upon the integrity of his decisions.

George Washington to Alexander Hamilton, 29 October 1795

Mr. Chase of Maryland is, unquestionably, a man of abilities; and it is supposed by some, that he would accept the appointment of Attorney General. Though opposed to the adoption of the Constitution, it is said he has been a steady friend to the general government since it has been in operation. But he is violently opposed in his own State by a party, and is besides, or to speak more correctly has been, accused of some impurity in his conduct."

John Adams to Abigail Adams, 6 February 1796

Mr. Chase is a new Judge, but although a good 1774 Man his Character has a Mist about it of suspicion and Impurity which gives occasion to the Enemy to censure. He has been a warm Party Man, and has made many Ennemies. His Corpulency . . . is against his riding Circuit very long."

Jeffersonian Descriptions of Samuel Chase

• Richmond, Va. *Auroa*, 20 June 1800

"Judge Chase [was] An Unprincipled tyrant, totally unfit to be intrusted with any power over the lives or liberties of *the free citizens of America*."

• Wilmington, Del. *Mirror of the Times*, 15 Nov. 1800

"Naturally proud, imperious, & overbearing — positive in his dogmas — supercilious in his manners — prejudiced in his decisions — and headstrong in his opinions . . . "

Samuel Chase to James McHenry, 4 December 1796

A free Press is the Support of Liberty and a Republican Govt., but a licentious press is the bane of freedom, and the Peril of Society, and will do more to destroy real liberty than any other Instrument in the Hands of knaves & fools.

Judge Richard Peters to Timothy Pickering, 24 January 1804

never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble.

Samuel Chase: Charge to the Baltimore Grand Jury, 2 May 1803

The late alteration of the Federal judiciary by the abolition of the office of the sixteen circuit judges, and the recent change in our state Constitution by the establishing of universal suffrage, and the further alteration that is contemplated in our State judiciary (if adopted) will in my judgment take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. . . . Our Republican Constitution will sink into a mobocracy, — the worst of all possible government . . . the modern doctrines by our late reformers, that all men in a state of society are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us; and I fear that it will rapidly progress until peace and order, freedom and property, shall be destroyed."

THE IMPEACHMENT OF SAMUEL CHASE

President Jefferson to Rep. Joseph H. Nicholson, 13 May 1803

Ought the seditious and official attack on the principles of our Constitution and of a State to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration. For myself, it is better that I should not interfere."

Aaron Burr, as Vice President of the U.S., presided over the impeachment trial in the Senate. A newspaper reported that it had usually been "the practice in Courts of Justice to arraign the murderers before the *Judges*, but now we behold the *Judge* arraigned before the *murderer*."

House of Representatives impeaches Chase on 12 March 1804 by a vote of 73 to 32.

Eight articles approved: Six dealt with the treason trial of John Fries and the sedition trial James Callender trials; the last dealt with the charge to the Baltimore grand jury.

William Branch Giles: Opinion About Impeachment

"Impeachment is nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another. . . . And a removal by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better."

THE SENATE IMPEACHMENT TRIAL OF SAMUEL CHASE

34 Senators (25 Republicans, 9 Federalists). 3 Republican dissenters would stop conviction

Chase took small role in his own defense. He did not testify. He was ill with "a severe attack of the gout." Painful for him to sit through the daily sessions. He asked to be and was excused after the testimonies of the witnesses. Still seven days of closing arguments, but Chase was confident his attorneys would be successful.

Samuel Chase's Defense

Chase opened the first day of the trial by reading a prepared defense. Assisted by two of his attorneys, the reading took four hours. Chase argued:

1. denied the truth of some of the charges
2. his actions were legally correct or proper and justified
3. that some of his actions that he was charged with followed the practice in Virginia and Maryland
4. if he had erred, it had been an honest mistake — no criminality or malicious intent

5. public officials could be impeached only for criminal offenses — not improprieties

6. the district judges that sat and concurred with him in the Fries, Callender and Newcastle grand jury cases had not been impeached.

George Washington Campbell (House manager)

Impeachment he argued was a check upon "abuses of power. Impeachment . . . may fairly be considered a kind of inquest into the conduct of an officer, merely as it regards his office; the manner in which he performs the duties thereof; and the effects that his conduct therein may have on society. It is more in the nature of a civil investigation, than a criminal prosecution." The managers did not have to show that Chase had done anything criminal, but only "that the accused has transgressed the line of his official duty . . . and that this conduct can only be accounted for on the ground of impure and corrupt motives." Chase's whole conduct showed "a corrupt partiality and predetermination unjustly to oppress" those he disliked, thus "turning the judicial power . . . into an engine of political oppression."

Joseph H. Nicholson (House manager)

"We do contend that this is a criminal prosecution, for offences committed in the discharge of high official duties." But since judges served during good behavior, "misbehavior in office" was a criminal offense for purposes of impeachment whether indictable or not.

Caesar Rodney (House manager)

Agreed with Nicholson, but asserted that Chase had committed indictable offense by denying Fries his constitutional rights to counsel and to trial by an impartial jury. He complained that "party feelings" and "political bigotry" had made the judiciary an instrument of faction rather than a defender of impartial justice. He favored the independence of the judiciary, but not the "inviolability of judges. . . . Give any human

being judicial power for life, and annex to the exercise of it the kingly maxim 'that he can do no wrong,' . . . you transform him into a despot, regardless of all law, but his own sovereign will and pleasure."

Testimony ended on 20 February after hearing more than fifty witnesses. It was clearly shown that Randolph, not an attorney, was no match for Chase and his lawyers. The prosecution's witnesses either substantiated Chase, presented a neutral assessment of Chase, or were so biased against Chase that their testimonies were discredited. Most difficult problem for Chase was when some witnesses indicated that he was biased against James Callender before the trial. Chase, however, had two witnesses who denied he was prejudicial against Callender and that Callender's lawyers had shortcomings in the way that they handled the case.

John Quincy Adams's Description of John Randolph's Conclusion for the Prosecution

He began a speech of about two hours and a half, with as little relation to the subject matter as possible — without order, connections, or argument; consisting altogether of the most hackneyed commonplaces of popular declamation, mingled up with panegyrics and invectives upon person, with a few well-expressed ideas, a few striking figures, much distortion of face and contortion of body, tears, groans, and sobs, with occasional pauses for recollection, and continual complaints of having lost his notes.

George Clinton to Pierre Van Cortlandt, 3 March 1805

I will only observe that several of the members who voted for his acquittal had no doubt but that the charges against him were substantial and of course that his conduct was unproper and reprehensible, but considering that many parts of it were sanctioned by the practice of the other judges ever since the commencement of the present Judiciary systems and that the act with which he was charged was not prohibited by any express and positive law they could not consistently with their ideas of justice find him guilty of

high crimes and misdemeanors. It was to such refined reasoning of some honest men that he owes his acquittal.

Vote on the Eight Articles of Impeachment

Article 1 — 16 Guilty; 18 Not Guilty

Article 2 — 10 Guilty; 24 Not Guilty

Article 3 — 18 Guilty; 16 Not Guilty*

Article 4 — 18 Guilty; 16 Not Guilty*

Article 5 — 0 Guilty; 34 Not Guilty

Article 6 — 4 Guilty; 30 Not Guilty

Article 7 — 10 Guilty; 24 Not Guilty

Article 8 — 19 Guilty; 15 Not Guilty*

*Simple majority votes guilty; not the two-thirds majority needed for conviction.

LEGACY OF THE SAMUEL CHASE IMPEACHMENT

Acquittal of Chase

1. Discredited John Randolph of Roanoke

Randolph "had boasted with great exultation that this was *his* impeachment — that every article was drawn by *his* hand, and that *he* was to have the whole merit of it."

2. Discredited idea of impeaching judges for political purposes

3. Discredited practice of judges being partisan both on and off the bench

John Marshall to Samuel Chase, 23 January 1805

According to the ancient doctrine a jury finding a verdict against the law of the case was liable to an attaint; & the amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment. As, for convenience & humanity the old doctrine of attaint has yielded to

the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault.

Thomas Jefferson to Charles Hammond, Monticello, 18 August 1821

It has long however been my opinion, and I have never shrunk from its expression . . . that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body, (for impeachment is scarcely a scare-crow), working like gravity by night and by day, gaining a little today & a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the states, & the government of all be consolidated into one.

THE TREASON TRIAL OF AARON BURR

MARCH-SEPTEMBER 1807

BACKGROUND ON AARON BURR

Alexander Hamilton to ?, Philadelphia, 26 September 1792

Mr. Burr's integrity as an Individual is not unimpeached. As a public man he is one of the worst sort—a friend to nothing but as it suits his interest and ambition. Determined to climb to the highest honours of State, and as much higher as circumstances may permit—he cares nothing about the means of effecting his purpose. Tis evident that he aims at putting himself at the head of what he calls the "popular party" as affording the best tools for an ambitious man to work with. Secretly turning Liberty into ridicule he, knows as well as most men how to make use of the name. In a word, if we have an embryo-Caesar in the United States 'tis Burr.

Alexander Hamilton to Gouverneur Morris, New York, 24 December 1800

Another subject—*Jefferson* or *Burr*?—the former without all doubt. The latter in my judgment has no principle public or private—could be bound by no agreement—will listen to no monitor but his ambition; & for this purpose will use the *worst* part of the community as a ladder to climb to permanent power & an instrument to crush the better part. He is bankrupt beyond redemption except by the resources that grow out of war and disorder or by a sale to a foreign power or by great peculation. War with Great Britain would be the immediate instrument. He is sanguine enough to hope every thing—daring enough to attempt every thing—wicked enough to scruple nothing. From the elevation of such a man heaven preserve the Country!

Thomas Jefferson: Conversations with Aaron Burr

January 26, 1804: I should here notice that Colo. Burr must have thought that I could swallow strong things in my own favor, when he founded his acquiescence in the nomination as Vice President to his desire of promoting my honor, the being with me

whose company & conversation had always been fascinating to him &c. I had never seen Colo. Burr till he came as a member of Senate. His conduct very soon inspired me with distrust. I habitually cautioned Mr. Madison against trusting him too much. I saw afterwards that under Genl. W.'s and Mr. A.'s administrations, whenever a great military appointment or a diplomatic one was to be made, he came post to Philadelphia to show himself & in fact that he was always at market, if they had wanted him. . . .

April 15, 1806: . . . that I had always used him with politeness, but nothing more: that he aided in bringing on the present order of things, that he had supported the administration, & that he could do me much harm . . .

that he must be sensible the public had withdrawn their confidence from him & that in a government like ours it was necessary to embrace in its administration as great a mass of public confidence as possible, by employing those who had a character with the public, of their own, & not merely a secondary one through the Executive.

Aaron Burr to Charles Biddle, 18 July 1804

[One week after Burr shot Hamilton in a duel] "It is the opinion of all considerate Men here, that my only fault has been in bearing so much & so long.

You will remark that all our intemperate and unprincipled Jacobins who have been for Years reviling H. as a disgrace to the Country and a pest to Society are now the most Vehement in his praise, and you will readily perceive that their Motive is, not respect to him but, Malice to me—"

British Minister to U.S. Anthony Merry to Lord Harrowby, Philadelphia, 6 August 1804

"I have just received an offer from Mr. Burr the actual Vice President of the United States (which Situation he is about to resign) to lend his assistance to His Majesty's Government in any Manner in which they may think fit to employ him, particularly in endeavouring to effect a Separation of the Western Part of the United States from that which lies between the Atlantick and the Mountains, in it's whole Extent.—His

Proposition on this and other Subjects will be fully detailed to your Lordship by Col: Williamson who has been the Bearer of them to me, and who will embark for England in a few Days.—It is therefore only necessary for me to add that if, after what is generally known of the Profligacy of Mr. Burr's Character, His Majesty's Ministers should think proper to listen to his offer, his present Situation in this Country where he is now cast off as much by the democratic as by the Federal Party, and where he still preserves Connections with some People of Influence, added to his great Ambition and Spirit of Revenge against the present Administration, may possibly induce him to exert the Talents and Activity which he possesses with Fidelity to his Employers"

ENCODED LETTER

Aaron Burr to General James Wilkinson, 22 and 29 July 1806

Your letter postmarked May 13th is received. I, Aaron Burr, have obtained funds and have actually commenced the enterprise. Detachments from different points and under various pretensions will rendezvous on the Ohio, first of November. Everything internal and external favors views. Naval protection of England is assured. Truxton is going to Jamaica to arrange with the admiral on that station. It will meet us at the Mississippi. England, a navy of the United States are ready to join, and final orders are given to my friends and followers. It will be a host of choice spirits. Wilkinson shall be second to Burr only; Wilkinson shall dictate the rank and promotions of his officers. Burr will proceed westward, first August, never to return. With him goes his daughter; her husband will follow in October with a corps of worthies.

The object is brought to the point so long desired. Burr guarantees the result with his life and honor, with the lives and honor and the fortunes of hundreds of the best blood of the country. Burr's plan of operations is to move down rapidly from the Falls [of the Ohio] of the 15th of November with the first five hundred or one thousand men, in light boats now constructed for that purpose; to be at Natchez between the 5th and 15th of December, there to meet you, there to determine whether it will be expedient in the first instance to seize on or pass by Baton Rouge. On receipt of this send Burr an answer. Draw

on Burr for all expenses, etc.

The people of the country to which we are going are prepared to receive us; their agents, now with Burr, say that if we will protect their religion, and not subject them to a foreign power, that in three weeks all will be settled. The gods invite us to glory and fortune; it remains to be seen whether we deserve the boon.

Thomas Jefferson: Special Message to Congress, 22 January 1807

. . . It appeared that he [Burr] contemplated two distinct objects, which might be carried on either jointly or separately, and either the one or the other first, as circumstances should direct. One of these was the severance of the Union of these States by the Alleghany mountains; the other, an attack on Mexico. A third object was provided, merely ostensible, to wit: the settlement of a pretended purchase of a tract of country on the Washita, claimed by a Baron Bastrop. This was to serve as the pretext for all his preparations, an allurement for such followers as really wished to acquire settlements in that country, and a cover under which to retreat in the event of final discomfiture of both branches of his real design. . . .

He seduced good and well-meaning citizens, some by assurances that he possessed the confidence of the government and was acting under its secret patronage, a pretence which obtained some credit from the state of our differences with Spain; and others by offers of land in Bastrop's claim on the Washita. . . .

In Kentucky, a premature attempt to bring Burr to justice, without sufficient evidence for his conviction, had produced a popular impression in his favor, and a general disbelief of his guilt. . . .

Surmizes have been hazarded that this enterprize is to receive aid from certain foreign powers. But these surmizes are without proof or probability. . . . These surmizes are, therefore, to be imputed to the vauntings of the author of this enterprise, to multiply his partisans by magnifying the belief of his prospects and support.

Thomas Jefferson to Gov. William C. C. Claiborne, Washington, 5 February 1807

. . . On great occasions every good officer must be ready to risk himself in going beyond the strict line of law, when the public preservation requires it; his motives will be a justification as far as there is any discretion in his ultra-legal proceedings, and no indulgence of private feelings. On the whole, this squall, by showing with what ease our government suppresses movements which in other countries requires armies, has greatly increased its strength by increasing the public confidence in it. It has been a wholesome lesson too to our citizens, of the necessary obedience to their government.

Thomas Jefferson to William Branch Giles, Monticello, 20 April 1807

. . . That there should be anxiety & doubt in the public mind, in the present defective state of the proof, is not wonderful; and this has been sedulously encouraged by the tricks of the judges to force trials before it is possible to collect the evidence, dispersed through a line of 2000 miles from Maine to Orleans. . . . Aided by no process or facilities from the *federal* courts, but frowned on by their new born zeal for the liberty of those whom we would not permit to overthrow the liberties of their country, we can expect no revealments from the accomplices of the chief offender. Of treasonable intentions, the judges have been obliged to confess there is probable appearance. What loophole they will find in it, when it comes to trial, we cannot foresee. . . .

If there ever had been an instance in this or the preceding administrations, of federal judges so applying principles of law as to condemn a federal or acquit a republican offender, I should have judged them in the present case with more charity. All this, however, will work well. The nation will judge both the offender & judges for themselves. If a member of the Executive or Legislature does wrong, the day is never far distant when the people will remove him. They will see then & amend the error in our Constitution, which makes any branch independent of the nation. They will see that one of the great co-ordinate branches of the government, setting itself in opposition to the other two, and to the common sense of the nation, proclaims impunity to that class of offenders which endeavors to overturn the Constitution, and are themselves protected in it by the

Constitution itself; for impeachment is a farce which will not be tried again. If their protection of Burr produces this amendment, it will do more good than his condemnation would have done. Against Burr, personally, I never had one hostile sentiment. I never indeed thought him an honest, frank-dealing man, but considered him as a crooked gun, or other perverted machine, whose aim or stroke you could never be sure of. Still, while he possessed the confidence of the nation, I thought it my duty to respect in him their confidence, & to treat him as if he deserved it; and if this punishment can be commuted now for any useful amendment of the Constitution, I shall rejoice in it.

THE TRIAL OF AARON BURR, 30 March-15 September 1807

30 March-1 April

commitment hearing before John Marshall and Cyrus Griffin

Burr is committed on misdemeanor, but not treason

22 May-24 June

grand jury indicts Burr for treason and misdemeanor

17 August-1 September

trial for treason; Burr found not guilty

9-15 September

Burr acquitted of misdemeanor

John Marshall: On Public's Interest in Burr Case

The interest which the people have in this prosecution, has been stated; but it is firmly believed, that the best and true interest of the people is to be found in a rigid adherence to those rules, which preserve the fairness of criminal prosecutions in every stage. (Robertson, I, 100)

Aaron Burr: Defense in Court, May 1807

. . . our president's a lawyer, and a great one, too. He certainly ought to know what it is that constitutes war. Six months ago, he proclaimed that there was a civil war; and

yet, for six months have they been hunting for it, and still cannot find one spot where it existed. There was, to be sure, a most terrible war in the newspapers, but no where else.

Luther Martin: Statement in Court, June 1807

This is a peculiar case, sir. The president has undertaken to prejudge my client by declaring that, "of his guilt there can be no doubt." He has assumed to himself the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend. And would this president of the United States, who has raised all this absurd clamor, pretend to keep back the papers which are wanted for this trial, where life itself is at stake? It is a sacred principle that in all such cases the accused has a right to all evidence which is necessary for his defense. And whoever withholds, wilfully, information that would save the life of a person charged with a capital offense is substantially a murderer, and so recorded in the register of heaven.

John Marshall: Opinion on Issuing a Subpoena Duces Tecum to President Jefferson, June 1807

It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it, should certainly regret, that a paper, which the accused believed to be essential to his defense, which may, for aught that now appears, be essential, had been withheld from him. I will not say that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment with respect to myself, it would be to deplore most earnestly the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

[Jefferson objects to this, but in the trial before the petit jury, on August 4, Hay tells the court that he has the ciphered letter.]

Thomas Jefferson to George Hay, 17 June 1807

Jefferson would not attend in person: As to our personal attendance in Richmond, I am persuaded the Court is sensible that paramount duties of the nation at large control the obligation of compliance with their summons in this case; as they would, should we receive a similar one, to attend the trials of Blennerhassett & others, in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place, other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not mean that it should be withdrawn from its station by any co-ordinate authority.

Jefferson would not send papers automatically: All nations have found it necessary that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, must be the sole judge of which of them the public interests will permit publication. [Congress had already recognized this executive privilege.] [Hay indicated that most of the documents in question had already been received by him earlier from the President. Wilkinson's letter of 21 October was the last one yet to come.]

John Wickham: Defense Argument, 21 August 1807

If the principles for which I have contended be correct, this prosecution can not succeed; it appears to my judgment, that if they be disregarded, and the doctrines supported by the gentlemen on the other side prevail, these will be the consequences:

First. If a man can be indicted as being present, for overt acts committed by others, when he was absent in a different state and district, the constitution of the United States, which was so ably and carefully drawn up in order to secure and perpetuate the freedom of the people of this country, will be a dead letter. A citizen may be seized by military force, dragged from one end of the continent to the other, tried far from his family and

friends, where he is a stranger, at a place where he never was, and among people whom he never saw.

Secondly, He is to be tried without any notice in the indictment of the real nature of the charge against him, or where the war which he is accused of levying. The indictment against him states that he did the act himself, when in truth he was hundreds of miles distant from the scene of action, and the act charged against him was done by others.

Thirdly. The doctrine of the cruel Jeffries is to be applied against him. He is to be tried for an act done by another, without producing a record of the conviction of that other, for whose alleged guilt he is to suffer.

Fourthly. The law of treason, and the rules concerning it, as heretofore universally considered, are totally misunderstood. A new definition of treason is adopted. The levying of war may be secret, without arms, without force, without any overt act.

All these arguments will apply not to this case only, but to every case that may happen in any part of the United States. These will be the certain consequences of the doctrines contended for by the gentlemen on the other side, if sanctioned by this court.Will they seriously contend for doctrines that will expose all the people of this country more to the dangers of constructive treason, to greater oppression and hardships, than the people of any other country have ever been subjected to? Certainly they will not. The records of this trial will be a monument of an attempt to establish principles that must infallibly introduce slavery. The attempt can not succeed.

Luther Martin to Joseph Alsop, Richmond, 26 June 1807

. . . Never, I believe, did any Government thirst more for the Blood of a victim than our enlightened . . . philanthropic Government for the Blood of my friend.

George Hay: On Whether Burr was an Accessory to the Fact of Treason, 24 August 1807

[Burr was] the first mover of the plot; he planned it, he matured it; he contrived

the doing of the overt acts which others have done..He was the *Alpha* and *Omega* of this treasonable scheme, the very body and soul, the very life of this treason.

William Wirt: On Being Uncivil Towards Burr, 25 August 1807

I feel it my bounden duty to proceed, in doing which, I beg that the prisoner and his counsel will recollect the extreme difficulty of clothing my argument in terms which may be congenial with their feelings. The gentlemen appear to me to feel a very extraordinary and unreasonable degree of sensibility on this occasion. They seem to forget the nature of the charge and that we are the prosecutors. We do not stand here to pronounce a panegyric on the prisoner, but to urge on him the crime of treason against his country. When we speak of treason, we must call it treason. When we speak of a traitor, we must call him a traitor. When we speak of a plot to dismember the union, to undermine the liberties of a great portion of the people of this country and subject them to a usurper and a despot, we are obliged to use the terms which convey those ideas. Why then are gentlemen so sensitive? Why on these occasions, so necessary, so unavoidable, do they shrink back with so much agony of nerve, as if instead of a hall of justice, we were in a drawingroom with Colonel Burr, and were barbarously violating towards him every principle of decorum and humanity?

William Wirt: On Burr as Principal Conspirator, 25 August 1807

Who Aaron Burr is we have seen in part already. I will add, that beginning his operations in New-York, he associates with him men whose wealth is to supply the necessary funds. Possessed of the main spring, his personal labour contrives all the machinery. Pervading the continent from New-York to New Orleans, he draws into his plan, by every allurement which he can contrive, men of all ranks and descriptions. To youthful ardour he presents danger and glory; to ambition, rank and titles and honours; to avarice the mines of Mexico. To each person whom he addresses he presents the object adapted tohis taste. His recruiting officers are appointed. Men are engaged throughout the continent. Civil life is indeed quiet upon its surface, but in its bosom this man has

contrived to deposit the materials which, with the slightest touch of his match, produce an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806, he goes forth for the last time to apply this match. . . .

Mr. Randolph wishes to know, how the line can be drawn between inlisting and striking a blow. The answer is obvious: *At the point of the assemblage*, where the courts of England and the highest court in this country have concurred in drawing it. A line strong and plain enough to be seen and known is drawn. Does reason, sir, require that you should wait until the blow be struck? If so, adieu to the law of treason and to the chance of punishment. The aspiring traitor has only to lay his plans, assemble his forces and strike no blow till he be in such power as to defy resistance. He understands the law of treason. He draws a line of demarcation for the purpose of keeping within the boundary of the law. He projects an enterprise of treason. He inlists men. He directs all the operations essential to its success from one end of the continent to the other; but he keeps himself within the pale of the law. He goes on continually acquiring accessions of strength, like a snow ball on the side of a mountain, till he becomes too large for resistance and sweeps every thing before him. He does every thing short of striking a blow. He advances till he gets to New-Orleans. He does not hazard the blow till he is completely ready; and when he does strike, it will be absolutely irresistible. Then what becomes of your constitution, your law of congress or your courts? He laughs them to scorn! Is this the way to discourage treason? Is it not the best way to excite and promote it? to insure it the most complete success? I conclude therefore that reason does not require *force* to constitute treason.

Benjamin Botts: Defense Argument, 26 August 1807

I insist that the president's interference with the prosecution is improper, illegal, and unconstitutional. From the very moment that a case enters into the pale of the judiciary, he ought to avoid all interference with it.

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Edmund Randolph: Closing Argument for Defense, 29 August 1807

But the constitution is to be considered according to reason and moral right; and both ask if a transcendent offender be to slip down into an accessory? The answer is, that if reason which judges of the fitness of things, moral right which gives more latitude, or even common sense, be permitted to add persons according to different men's ideas of propriety, what advantage is derived from the principles which has been so long cherished, that penal laws shall be construed strictly? what becomes of the doctrine ? What benefit can be had from the constitution containing precise terms and express enumeration of powers, if moral right, common sense and reason, according to the diversity of human opinions, are to be applied to infer and imply its meaning? We may apply these to *Eutopia, Oceana*, or even the visions of Plato, or rather the tribunal of Draco: for *wherever they*, or what is the same thing, men's different conceptions of them, are to determine what shall be right construction, *there* will be a tribunal of blood. Language must indeed be understood as the world understands it; but the ideas must not be extended beyond the natural import. I will ask a man of the most common understanding, who is not connected with the cause of Colonel Burr, whether a man at the distance of three hundred miles from the scene of operation can be the same as the actual perpetrator. Whether a man could be charged as present at the spot and doing an act when he was at three hundred miles distance. What would be his answer? Would he not call it the grossest absurdity? Does not the very idea of law revolt at such a construction? The constitution does not impose it. The common law, the gentleman admits, does not impose it; but common sense requires it! So that common sense shall say *absence* is *presence*, and shall consider *one* man as *another* and plunge a dagger into his breast against justice and reason! It is contrary to the common understanding of the world. It is impossible in the nature of things that a man at the distance of three hundred miles can be present. This transcends the wildest extravagance of fancy. By metaphysical legerdemain they annihilate space and consolidate identities! . . .

When the constitution was debated clause by clause in the convention, it was not insinuated by any of its opposers that the construction now contended for should ever be

resorted to. The idea was never advanced that a man might be thus made a traitor by fiction and relation, and considered as constructively present and constructively an actor though at the distance of several hundred miles from the place of action, much less that such a construction would ever be countenanced in any of our courts of justice. Not even so much as a conjecture was hazarded to that effect. It never entered into my mind, nor do I believe it entered into that of any other member of that body. And if the common law, with this doctrine of constructive presence, had been a part of this constitution, all the talents on earth would never have been able to have carried it.

The people of Virginia thought themselves safe on this subject. The construction now advocated was not avowed, much less supported, in the state convention. . . .

The constitution ought to be construed according to the plain and obvious import of its words. It will be in danger if there should be a departure from this construction. It never can be supposed that its framers intended that this fancy and imagination should be indulged in its future exposition.

Edmund Randolph: Closing Argument for Defense, 29 August 1807

Judges have passed through the temple of virtue and arrived at that of honour; but we find, that it is a just decree from the free will of the people, that the floor of that temple is slippery. Some may suppose that because the wheel of fortune is not seen immediately to move, it is at rest. The rapidity deceives the sight. He who means to stand firm in that temple must place his hand on the statue of wisdom; the pedestal of which is a lion. These are the only qualities by which they can be useful in their honourable station. Popular effusion and the violence and clamour of party they will disregard. It is the more necessary, as judges may hereafter mingle in politics; and they are but men; and the people are divided into parties. In the conflicts of political animosity justice is sometimes forgotten or sacrificed to mistaken zeal and prejudice. We look up to the judiciary to guard us. One thing I am certain of, that you will not look at consequences; that you will determine "fiat justitia" let the result be what it may.

John Marshall: Closing Opinion, 31 August 1807

War could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword; and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words; but the actual going to war is a fact which is proved by open deed. . . .

It is then the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's island; or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place: indeed the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which for the present no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner and by the same kind of testimony which would be required to prove actual presence. . . .

Much has been said in the course of the arguments on points on which the court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self reproach, would drain it to the bottom. But if he have no choice

in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace. . . .

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct.

Jury Verdict on the Charge of Treason, 1 September 1807

We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty.

(Burr objected to this incorrect, informal form, and after some argument, "Not guilty" was entered on the records of the court)

Thomas Jefferson to John B. Colvin, Monticello, 20 September 1810

. . . It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.

Thomas Jefferson to John Adams, Monticello, 24 January 1814

our cunning Chief Justice [John Marshall] . . . twist[ed] Burr's neck out of the halter of treason.

LEGACY OF THE BURR TRIAL

- Narrow definition of treason thus safeguarding rights
- Precedents set of subpoenaing the president—he is not above the law

  U.S. vs. Nixon, 1974: "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. . . . The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."
- Precedent set for executive privilege
- demonstrated the strength of the Union
- as a bad example, it showed that president should refrain from involvement in criminal cases before the judiciary
- Demonstrated independence of the judiciary

  Attempts to amend Constitution fail (all buried in committee):

  1. appointment of judges for a limited term
  2. judges removable on address of two-thirds of both houses of Congress
  3. Pennsylvania proposes removable by majority of both houses present and voting; and conviction on impeachment by a simple majority vote
  4. Massachusetts proposes removable by address of majority of House of Representatives and two-thirds of Senate